Office-Supreme Court, U.S.
FILED
OCT 2 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 553

PEOPLE OF THE STATE OF MICHIGAN, ex rel.
GEORGE H. WINKLE,
Petitioner/Appellant,

— vs. —

WILLIAM H. BANNAN, Warden of the State Prison,
Southern Michigan, Jackson, Michigan
Respondent/Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

WALTER A. KURZ
Attorney for Appellant
2408 Guardian Building
Detroit, Michigan 48226
962-2564

DENNIS BOYLE
Attorney for Appellant
1465 Penobscot Building
Detroit, Michigan 48226
962-3658

INDEX

	Pages
Verdicts/Judgments Below	2
Decisions/Opinions Below	2, 3
First Opinion on Appeal	2
Conflicting Opinion on Second Appeal	& 3
Michigan Constitutional Provisions Involved	15-16
Statement of the Case	17-28
Jurisdiction	3, 6
Questions Presented (Questions 1-21)	7-15
The Questions Presented are Substantial	37-54
A. The Constitutional Questions	28, 37, 48
B. Other Errors of the Court Below	13, 21, 44-45, 53
Conclusion	55
Appendix—AA (Excerpts—Transcripts of Testimony of "Arresting" Officers Re: Search and Seizure)	1-7AA
Appendix—A (For Contents see pages 2-3)	1-56A

CITATIONS

Abie State Bank v. *Bryan*, 282 U.S. 765, 773	7, 43
Agnello v. *United States*, 269 U.S. 20	51
Aguilar v. *State of Texas*, 84 S. Ct. 1509	4, 6
Anonymous v. *Baker*, 360 U.S. 287, 290	7
Ashcraft v. *Tennessee*, 322 U.S. 143, 147-8	7, 42
Beck v. *Washington*, 369 U.S. 541, 550	6, 40
Berman v. *United States*, 302 U.S. 211	6, 39
Black v. *Cutter Laboratories*, 351 U.S. 292	7, 41
Bovie v. *Columbia*, 12 L. Ed. 2d 894	55
Brinegar v. *United States*, 338 U.S. 160, 175-176	6, 51
Brock v. *North Carolina*, 344 U.S. 424, 427-428	5, 7, 44-45
Cantwell v. *Connecticut*, 309 U.S. 626; 310 U.S. 296	7
Carroll v. *United States*, 267 U.S. 132, 162	6, 51

	Pages
Chambers v. *Florida*, 309 U.S. 227, 228-9	7, 42
Chapman v. *United States*, 356 U.S. 610	51
Chicago, B & Q. R. Co. v. *Illinois ex rel Comr's*, 200 U.S. 561	41
Craig v. *Harny*, 331 U.S. 367, 373-4	7, 42
Creswill v. *Grand Lodge*, 225 U.S. 246, 261	7, 41
Deen v. *Hickman*, 358 U.S. 57, 874	6, 39
Elkins v. *United States*, 364 U.S. 206	6, 51
Elliott v. *State*, 116 S.W. 2d 1009 (1938)	52
Ellis v. *Dixon*, 349 U.S. 458, 463	41
Enterprise Irrig. Dist. v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 163-4	7, 41, 43, 44
Eustis v. *Bolles*, 150 U.S. 361, 370	7, 43
Fahy v. *Connecticut*, 375 U.S. 85	4, 6
Fiske v. *Kansas*, 274 U.S. 380, 385-6	7, 41
Florida v. *Mellon*, 373 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 265	6, 47
Flournoy v. *Wiener*, 321 U.S. 253, 263	7, 42
Fox Film Corp. v. *Muller*, 296 U.S. 207	7, 41
Georgia Ry. & Elec. Co. v. *Decatur*, 297 U.S. 620	6, 39
Godchaux v. *Estopinal*, 25 U.S. 179, 181	40
Green v. *United States*, 355 U.S. 184, 190	5, 7, 45
Hall v. *Warden*, 313 2d 483, 201 F. Supp. 639	40
Harris v. *United States*, 331 U.S. 145, 175-181	54
Henry v. *United States*, 361 U.S. 98	6, 51
Hoag v. *New Jersey*, 356 U.S. 464, 469-472, (Dissent, 474-480)	5, 7, 44-45
Irvin v. *Dowd*, 359 U.S. 394, 403-404, 409 (Dissent)	7, 41
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275, 290	7, 41, 43
Johnson v. *Risk*, 137 U.S. 300, 307	41
Johnson v. *State*, 220 P. 2d 469	54

Pages

Johnson v. *United States*, 333 U.S. 10 51
Ker v. California, 374 U.S. 23, 83 S. Ct. 1623, 1630, 1634 ..... 4, 6, 8, 11, 12, 13, 14, 31, 33, 36, 43, 44, 47, 48-49, 50-51
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110, 121 ..... 7, 42
Klinger v. *Missouri*, 13 Wall. 257, 263 41
Lanza v. *New York*, 370 U.S. 139 6
Largent v. *Texas*, 318 U.S. 418 ..... 6, 40
Lawrence v. *State Tax Commission*, 286 U.S. 276, 282-3 ..... 6, 40, 41, 44
Maguire v. *Taylor*, 8 Wall. 650, 665 41
Mapp v. *Ohio*, 367 U.S. 643, 655, 660 ..... 3, 4, 6, 8, 10, 11, 12, 13, 14, 23, 26-29, 31, 36, 38, 43, 44, 45-47, 48, 50, 51, 55
McCullogh v. *Maryland*, 17 U.S. 316, 406, 4 Wheat (U.S.) 316, 4 L. Ed. 579 47
Murdock v. *Memphis*, 20 Wall. 590, 636 ..... 7, 43
N.A.A.C.P. v. *Alabama*, 357 U.S. 449, 455 ..... 7, 43
Napue v. *Illinois*, 360 U.S. 264, 271-2 ..... 7, 42
Nielson v. *Lagow*, 12 How. 98, 110 41
Niemotko v. *Maryland*, 340 U.S. 268, 271 ..... 7, 42
Norris v. *Alabama*, 294 U.S. 587, 598 ..... 7, 42
Olmstead v. *United States*, 277 U.S. 439 6
Opinion of Attorney General (of Michigan), May 27, 1957 No. 2872 54
People v. *Anders*, 333 P. 2d 854 54
People ex rel Winkle v. *Bannan*, 372 Mich. 292, 125 N.W. 2d 875, 878, 879-80, 880-81, 882-892, 890, 891, 892, 893, 894 ..... 3, 30, 31-37, 38, 40, 42, 47, 49
People v. *Barrington*, 221 Mich. 571 53
People v. *Bendoni*, 263 Mich. 295 53
People v. *Carr*, 370 Mich. 251 ..... 52, 54
People v. *Gonzalas*, 356 Mich. 247, 250, 264 ..... 24, 26, 36, 53-54
People v. *Harper*, 365 Mich. 494 53

Pages

People v. *Kuntze*, 371 Mich. 419, 423, 426, 427; 124 N.W. 2d 269, 273, 274 ..... 34-35, 53, 54

People er rel Atty. Gen. v. *Lansing Municipal Judge*, 327 Mich. 410 ..... 52-53, 54

People v. *Lee*, 371 Mich. 563 52

People v. *Mickelson*, 380 P. 2d 658 52

People v. *Miller*, 245 Mich. 115, 116 54

People v. *Roache*, 237 Mich. 215 ..... 53, 54

People v. *Schaub*, 279 Mich. 457 52

People v. *Stein*, 265 Mich. 610 53

People v. *Stewart*, 232 Mich. 670 53

People v. *Watkins*, 166 N.W. 433 52

People v. *Winkle*, 358 Mich. 551, 554, 557; 100 N.W. 2d 309 ..... 1, 2, 5, 17, 24, 25, 26, 37, 42, 46

People v. *Zeigler* 358 Mich. 358, 361 ..... 53, 54

Pierre v. *Louisiana*, 306 U.S. 354, 358 6

Postal Tel. Cable Co. v. *Newport*, 247 U.S. 464, 476-8 ..... 7, 44

Preston v. *United States*, 376 U.S. 364, 84 S. Ct. 881, 883 ..... 4, 6, 11, 12, 13, 14, 31, 43, 44, 48, 51, 52

Prudential Ins. Co. v. *Cheek* 259 U.S. 530, 547 ..... 7, 42

Rios v. *United States*, 364 U.S. 253 51

Rogers v. *Alabama*, 192 U.S. 226, 230-1 ..... 6, 40

Slagle v. *Ohio*, 366 U.S. 259, 264 7

Spano v. *New York*, 360 U.S. 315 6

Staub v. *Baxley*, 355 U.S. 313, 318-319 ..... 7, 43

Stein v. *New York*, 346 U.S. 156, 157 52

Sterling v. *Constantin*, 287 U.S. 378, 398 ..... 7, 41-42

Stoner v. *California*, 376 U.S. 483 ..... 4, 6

Thomas v. Arizona, 356 U.S. 390 6

United States v. *Di Re*, 332 U.S. 581, 595 51

United States v. *Jeffers*, 342 U.S. 48, 51-52 52

United States v. *Lefkowitz*, 285 U.S. 452 53

	Pages
Ward v. *Love County*, 258 U.S. 17, 22-23	7, 44, 55
West Chicago St. R. Co. v. *Illinois ex rel Chicago*, 201 U.S. 506, 519-20	41
Williams v. *Bruffy*, 96 U.S. 176, 183	6, 40, 41
Williams v. *Kaiser*, 323 U.S. 471, 478	41
Winkle v. *Bannan*, 386 U.S. 34, Misc. No. 93	3, 33
Wolf v. *Colorado*	27
Wood v. *Chesborough*, 228 U.S. 672, 676-80	41
Zucht v. *King*, 260 U.S. 174	6, 40

Constitution of the United States:

Article 6, Section 2	48
Fourth and/or Fourteenth Amendments	4, 5, 8-15, 23, 25, 30-31, 36, 44, 46-48, 50
Fifth Amendment	4, 5, 8-15, 30-31, 36, 44, 48
Sixth Amendment	4, 8, 9

Statutes of the United States:

28 U.S.C., Sections 1257(1) and 1257(2)	6, 39
28 U.S.C. Section 1257(3)	6, 39
28 U.S.C., Section 2103	6

Constitution of State of Michigan: (of 1908 and 1964)

Article II, Section 10, as amended 1936 and 1952, and/or (Now) Article I, Section 11	3, 4, 10-12, 15-16, 23-24, 25, 26, 29-30, 36, 39, 40, 42, 44-46, 48, 55

Texts Citators, Periodicals etc.

American Jurisprudence, Vol. 11, Sections 40, 41, 42, and 44, and pages 646-652	47

Pages

Stern & Gressman, Supreme Court Practice, 3rd Ed. Sec. 3-27 (pages 94-101); Sec. 3-4 (pages 67 and 65); Sec. 3-5 (page 70); Sec. 3-6 (page 73) 40-41, 42

56 Yale Law Journal (1947) 581, 582 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.....

PEOPLE OF THE STATE OF MICHIGAN, ex rel.
GEORGE H. WINKLE,
Petitioner/Appellant,

— vs. —

WILLIAM H. BANNAN, Warden of the State Prison,
Southern Michigan, Jackson, Michigan
Respondent/Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellant, George H. Winkle, appeals from the final orders/decisions/opinions of the Supreme Court of the State of Michigan made/entered herein on March 4th, 1964, February 3rd, 1964, April 26, 1961, and January 4th, 1960, all affirming the judgment of convictions and respectively denying motion for rehearing and/or reaffirming on mandate/remand/appeal said Court's previous decision reported in 358 Mich. 551, 100 N.W. 2d 309 *(People v. Winkle)* and affirming said Court's Order entered April 26, 1961,

dismissing petitioner's/appellant's writs of habeas corpus and ancillary certiorari. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal and constitutional questions are presented.

OPINIONS BELOW

Copies of the judgments/verdicts of the Lenawee County Circuit Court of Michigan and of said Court's and the Michigan Supreme Court's opinions, findings of fact, conclusions of law, etc., as well as of the Michigan Supreme Court's decisions/rulings on appeal of the causes herein are all attached hereto as Appendices "A-1" through "A-56", as follows:

"A-1". The Judgments/verdicts/convictions (consolidated) of the Lenawee County Circuit Court of Michigan made/entered on January 31, 1958, are unreported;

"A-3". The opinion/decision of the Michigan Supreme Court made/entered on January 4, 1960, affirming aforesaid trial court's verdicts/convictions on appeal, is reported in *People* v. *Winkle*, 358 Mich. 551, 100 N.W. 2d 309;

"A-11". The Order of the Michigan Supreme Court made/entered on April 26, 1961, denying, without opinion, George Winkle's petition for allowance of writ of Habeas Corpus and for ancillary writ of certiorari Re: above verdicts/convictions/affirmance on appeal is unreported;

"A-12". The mandate/order of the United States Supreme Court made/entered November 6, 1961, granting George Winkle's motion for leave to proceed in forma pauperis and petition for writ of certiorari to the Supreme Court of Michigan, vacating this judgment and as suggested

by the Attorney General of Michigan, remanded the case for consideration in light of *Mapp* v. *Ohio*, 367 U.S. 643, is reported in 386 U.S. 34, Per Curiam, Misc. No. 93;

"A-12". The order of the Michigan Supreme Court made/entered on December 11, 1961, in compliance with this Court's above mandate, and, ordered that the order heretofore entered herein on April 26, 1961, denying habeas corpus and certiorari to the Circuit Court of the County of Lenawee be vacated and held for naught and that the case be rebriefed and submitted to this Court for consideration in light of *Mapp* v. *Ohio*, 367 U.S. 643, is unreported;

"A-14". The opinion/decision of the Michigan Supreme Court after rebriefing and re-submission of the cause/s was made/entered on February 3, 1964, affirming the Order of said Court entered April 26, 1961, dismissing Winkle's writs of habeas corpus and ancillary certiorari—is reported in *People ex rel Winkle* v. *Bannan*, 372 Mich. 292, 125 N.W. 2d 875;

"A-55". The Order of the Michigan Supreme Court made/entered on March 4, 1964, without opinion, denying Winkle's Motion/petition for re-hearing of above entitled opinion/decision (372 Mich. 292) is unreported;

JURISDICTION

A. Appellant attacks and seeks review of his criminal convictions in the State Court of Michigan had/obtained on basis and by virtue of the Michigan Constitution of 1908, Article II, Section 10, as Amended in 1936 and 1952 (now Article I, Section 11, of Michigan Constitution of 1964) all containing a search and seizure exemption proviso-which allows into evidence in any criminal proceedings in Michigan Courts any firearms, dangerous weapons or things, or

drugs, etc., seized outside the possessor's dwelling, said possessor then, thereunder and thereafter not having any right whatever to question the legality/constitutional validity of the search as a defense to possession—said possession being made a crime *per se* without any defenses whatever being available as a matter of fact and/or law; Appellant challenges the constitutional validity under the Federal Constitution of these Michigan Constitutional provisos and claims that said Article II, Section 10, and (now) Article I, Section 11, aforesaid, are repugnant to, in conflict with and in derogation of the statutes, laws and constitution of the United States, namely, the 4th, 5th, 6th and 14th Amendments, and are not a proper exercise of the police power of the State, but are unconstitutional and void in light of *Mapp* v. *Ohio* and *Ker* v. *California*, etc., infra.

Appellant further attacks and seeks review of his criminal convictions in the State Courts of Michigan on basis that the articles/items searched for and seized by the "arresting" officers were obtained and allowed into evidence in all State Court proceedings over timely and appropriate objections in violation of his fundamental Federal constitutional rights granted and guaranteed to him under the 4th, 5th, and 14th Amendments of the United States Constitution; That thereunder, among other things, there was an unreasonable/unconstitutional search and seizure violating his right of privacy and his right not to be subject to compulsory production of evidence against him under and by virtue of *Mapp* v. *Ohio*, 367 U.S. 643, *Ker* v. *California*, 374 U.S. 23, *Preston* v. *United States*, 376 U.S. 364, *Stoner* v. *California*, 376 U.S. 483, *Aguilar* v. *State of Texas*, 84 S. Ct. 1509, *Fahy* v. *Connecticut*, 375 U.S. 85, and other cases to be hereinafter referred to and cited.

Appellant further attacks and seeks review of his said criminal convictions on claim that he has been denied due process of law and subjected to Double Jeopardy in violation of his fundamental rights bestowed upon him by the 5th and 14th Amendments of the United States Constitution. *Green* v. *United States,* 355 U.S. 184, 190; *Brock* v. *North Carolina,* 344 U.S. 424; *Hoag* v. *New Jersey,* 356 U.S. 464.

B. Appellant hereby appeals to the Supreme Court of the United States from, and seeks to have reviewed, the final orders/decisions/opinions of the Supreme Court of the State of Michigan made/entered herein on March 4th, 1964, February 3rd, 1964, April 26, 1961, and January 4th, 1960, *all* affirming the judgments of convictions and respectively denying a Motion for re-hearing and/or reaffirming on mandate/remand/appeal de novo said Court's previous decision reported in 358 Mich. 551, 100 N.W. 2nd 309 *(People* v. *Winkle)* and affirming said Court's Orders dismissing petitioner's/appellant's writs of habeas corpus and ancillary certiorari;

Appellant's present and within Notice of Appeal to The Supreme Court of the United States, with Proof of Service thereof, was duly and properly filed in the Circuit Court for the County of Lenawee, Michigan, on June 2nd, 1964, said Court, being in this instance, "The Court possessed of the record."

An Order allowing defendant/appellant Extension of Time, to October 2nd, 1964, Wherein to File Jurisdictional Statement, etc., On Appeal of the Cause to the United States Supreme Court, was made/entered by the Lenawee County Circuit Court, Michigan, on July 20, 1964, and Proof of Service thereof on appellee and others made on July 30,

1964, was filed with the Clerk of said Court on September 16, 1964.

C. The Jurisdiction of the Supreme Court to review these orders/decisions/opinions/: (1) By Direct Appeal—is conferred by and rests upon 28 U.S.C., Sections 1257(1) and 1257(2), and/or (2) By Petition for writ of certiorari —is conferred by and rests upon 28 U.S.C. Section 1257(3) and/or 28 U.S.C. Section 2103 (because of the complexities of the case).

D. The following decisions sustain the jurisdiction of the Supreme Court to review the judgments/verdicts/convictions/decisions/opinions on Direct Appeal in this case, to wit:

(Re: Search and Seizure, etc.)

Mapp v. *Ohio*, *Ker* v. *California*, *Preston* v. *United States*, *Stoner* v. *California*, *Aguilar* v. *State of Texas*, *Fahy* v. *Connecticut*, supra, and *Lanza* v. *New York*, 370 U.S. 139, *Elkins* v. *United States*, 364 U.S. 206, *Henry* v. *United States*, 361 U.S. 98, *Olmstead* v. *United States*, 277 U.S. 439, *Brinegar* v. *United States*, 338 U.S. 160, *Carroll* v. *United States*, 267 U.S. 132, *Florida* v. *Mellon*, 373 U.S. 12.

(Re: Jurisdiction, etc.)

Spano v. *New York*, 360 U.S. 315, *Thomas* v. *Arizona*, 356 U.S. 390, *Pierre* v. *Louisiana*, 306 U.S. 354, 358; *Berman* v. *United States*, 302 U.S. 211; *Georgia Ry. & Elec. Co.* v. *Decatur* 297 U.S. 620, *Deen* v. *Hickman*, 358 U.S. 57; *Williams* v. *Bruffy*, 96 U.S. 176, 183, *Zucht* v. *King*, 260 U.S. 174, *Beck* v. *Washington*, 369 U.S. 541, 550, *Rogers* v. *Alabama*, 192 U.S. 226, 230-1; *Largent* v. *Texas*, 318 U.S. 418, *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-3;

Black v. *Cutter Laboratories*, 351 U.S. 292, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, *Irvin* v. *Dowd*, 359 U.S. 394, 403-404, 409 (Dissent), *Enterprise Irrig. Dist.* v. *Farmer's Mut. Canal Co.*, 243 U.S. 157, 163-4, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290; *Fiske* v. *Kansas*, 274 U.S. 380, 385-6, *Creswill* v. *Grand Lodge*, 225 U.S. 246, 261, *Sterling* v. *Constantin*, 287 U.S. 378, 398, *Norris* v. *Alabama*, 294 U.S. 587, 590, *Chambers* v. *Florida*, 309 U.S. 227, 228-9, *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-8, *Craig* v. *Harney*, 331 U.S. 367, 373-4, *Niemotko* v. *Maryland*, 340 U.S. 268, 271, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121, *Napue* v. *Illinois*, 360 U.S. 264, 271-2; *Flournoy* v. *Wiener*, 321 U.S. 253, 263, *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547; *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773, *Staub* v. *Baxley*, 355 U.S. 313, 318-319, *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455; *Murdock* v. *Memphis*, 20 Wall. 590, 636, *Eustis* v. *Bolles*, 150 U.S. 361, 370; *Ward* v. *Love County*, 258 U.S. 17, 22-23, *Postal Tel. Cable Co.* v. *Newport*, 247 U.S. 464, 476-8; *Brock* v. *North Carolina*, 344 U.S. 424, 427-428, *Hoag* v. *New Jersey*, 356 U.S. 464, 469-472, *Green* v. *United States*, 355 U.S. 184.

The following decisions sustain the jurisdiction of the Supreme Court to review the convictions/orders/decisions/opinions on the alternative remedy/method of petition for writ of certiorari and to treat the Jurisdictional Statement as such: *Anonymous* v. *Baker*, 360 U.S. 287, 290; *Slagle* v. *Ohio*, 366 U.S. 259, 264; *Flournoy* v. *Wiener*, 321 U.S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547; *Cantwell* v. *Connecticut*, 309 U.S. 626, 310 U.S. 296; and all cases cited in preceding paragraph/section D.

QUESTIONS PRESENTED

1. In deciding appeal of the cause herein on mandate

from the United States Supreme Court, did the Michigan Supreme Court fail, neglect, refuse or arbitrarily or deliberately decline to fully, fairly, clearly and/or unequivocably consider/decide all the substantial and important State and Federal law and constitutional issues, questions and grounds urged/brought by appellant on Appeal (or in his briefs) and thereby denied him Due Process and Equal Protection of the laws under the 4th and 14th Amendments to the United States Constitution?

2. In deciding the said appeal, did the Michigan Supreme Court misconstrue, misapply or misconceive the applicable Federal constitutional provisions, the 4th, 5th and 14th Amendments, and United States Supreme Court opinions, for example, *Mapp* v. *Ohio*, 367 U.S. 643, *Ker* v. *California*, 374 U.S. 23, etc., erroneously holding the search and seizure herein complained of reasonable and constitutional and thereby deprived and denied to appellant all rights, privileges and immunities granted/guaranteed thereunder and under said Constitutional Amendments and laws of the United States?

3. Has the Michigan Supreme Court by its decision in this cause, wrongfully, erroneously, arbitrarily and incompletely decided substantial and "unsettled" Federal Questions arising under the 4th, 5th and 6th Amendments of the Constitution and/or laws of the United States concerning reasonableness/constitutional validity of the search and seizure and admissibility of fruits thereof in evidence herein—and/or has it rendered at least doubtful decisions on questions/issues of denial of due process and equal protection of the laws resulting thereby and timely/properly raised by appellant?

4. Has the Michigan Supreme Court unfairly, arbi-

trarily and deliberately, in opposition/contrary to and in rejection of the Federal laws and constitution, namely, the 14th Amendment, denied/rejected appellant's contentions that the State laws and actions which he attacked, complained of, and under and by virtue of which his convictions were obtained, did/do violate the 4th, 5th and 14th Amendments of the Federal constitution regarding reasonableness/constitutionality of search and seizure, due process of law and equal protection of the laws as well as opinions interpreting same, thereby depriving appellant of his fundamental rights bestowed thereunder?

5. Has the Michigan Supreme Court failed to comply with the mandate of the United States Supreme Court herein and deprived appellant of due process of law under the 5th and 14th Amendments of the Federal Constitution by affirming its prior decisions/orders and upholding appellant's convictions under and by virtue of newly created law, different theories or principles of law and/or new/different interpretations of prior existing State or Federal laws and Constitutional Amendments 4, 5, 6 and 14 (different than those upon which said Court's earlier affirmance/denial was predicated)?

A. Did said Court thereby subject appellant to Double Jeopardy in violation of his rights under the 5th and 14th Amendments of the Federal Constitution?

6. Should the United States Supreme Court now impose an enforced waiver of the alternative grounds used and employed by the Michigan Supreme Court in deciding appellant's last Appeal but not brought in issue nor used for affirmance of the trial Court's judgment/convictions on original Appeal? Were such alternative grounds used to evade Federal laws and constitutional issues of constitu-

tionality/validity of the Michigan Constitution Provisos and the reasonableness of the search and seizure herein, thereby imposing undue and unreasonable delay and costs of litigation and attempting to save said Michigan Constitutional Provisos attacked by appellant?

7. Does the State of Michigan Constitutional (search and seizure) Exemption Provision, Article II, Section 10, now Article I, Section 11, and the decisions thereunder and in support thereof (all as are here under attack)—discriminate against raising of Federal claims, and can it and has it been used to stifle a federal claim or claims and/or to evade vindication of federally protected rights bestowed/guaranteed as fundamental rights of privacy, due process, freedom from unreasonable search and seizure and equal protection of the laws under the 4th, 5th, and 14th Amendments of the Federal Constitution?

8. Did the Michigan Supreme Court decide appellant's appeal herein in the manner that it did, on *claimed* nonfederal issues/grounds, in order to save from review by the United States Supreme Court the challenged Constitutionality of said Article II, Section 10, now Article I, Section 11, thereby to preserve it, and to serve as a mere device to prevent a review of said Court's decision upon the claim timely raised that said provisos are repugnant to and in derogation of the 4th, 5th and 14th Amendments of the Federal Constitution?

9. Is the search and seizure exemption provision contained in said Article II, Section 10 (now Article I, Section 11) of the Michigan Constitution by reason of *Mapp* v. *Ohio*, supra, repugnant to, in conflict with and in derogation of the 4th, 5th and 14th Amendments of the Federal Constitution, statutes and laws and is it unconstitutional

and void, not being a proper exercise of the police power of the State?

10. Can and should *Mapp* v. *Ohio*, supra, be retrospectively/retroactively applied so as to require release of appellant herein, whose attack on his conviction in the nature of an appeal was pending in the United States Supreme Court before *Mapp* v. *Ohio*, supra, was decided, and who had timely complained of and attacked the unconstitutionality of said Article II, Section 10, and of the unreasonable search and seizure under the 4th, 5th and 14th Amendments of the Federal Constitution and had moved for suppression of the evidence upon which he was convicted at every stage of the State Court's proceedings below and on appeal?

11. Assuming arguendo, that Article II, Section 10, (now Article I, Section 11) is in conflict with and in derogation of the Federal Constitution, Amendments 4, 5, and 14, by virtue of *Mapp* v. *Ohio*, supra, and that *Mapp* must be applied retrospectively to appellant's cases herein, then without the benefit of said non-exclusionary proviso/rule was the search and seizure of the articles from appellant's automobile unlawful and unreasonable under the circumstances of the case, no probable cause existing therefor or for his arrest and no search warrant having been procurred therefor?

A. Was the search and seizure of the items allegedly seized, i.e., tools, gun, explosive, etc., under the facts and circumstances of this case reasonable and consistent with appellant's rights under the 4th, 5th and 14th Amendments of the Federal Constitution in light of *Mapp*, *Ker*, *Preston*, cases, supra?

B. Inasmuch as the items above described were obtained by a search in violation of the said Amendments of the Federal Constitution are they inadmissible in evidence in the Courts of the State of Michigan and should such evidence have been suppressed or now be suppressed under said Amendments and in light of *Mapp, Ker, Preston*, cases supra?

12. Were(would) the appellant's Constitutional rights granted him under the 4th, 5th and 14th Amendments of the Federal Constitution be violated and were (would) he be denied due process by law by allowance of introduction/-admission into evidence all alleged items illegally or unreasonably searched for and seized as an incident to issuance of a summons for a motor vehicle code or traffic rule violation and while appellant was not under arrest for commission of a felony and no probable cause existed or no search warrant or warrant having been issued therefor?

13. Was/is the search and seizure under the facts and circumstances of the case under then/existing Michigan and/or Federal law, unlawful and unreasonable (and) if the Trial Court in its judgment/verdict/opinion so held and the Michigan Supreme Court in its original opinion/-decision on first appeal also so held or strongly inferred, but affirmed the verdicts/convictions on basis of the Article II, Section 10, Michigan Constitutional (search and seizure) Exemption Provision?

14. Whether enforcing of a traffic infraction and concomitant unauthorized/unlawful questioning of driver *and* passenger of an automobile following a traffic rule infraction, for which the law provides mere issuance of a Summons—constitutes an arrest? Should such procedure/methods be allowed under the 4th, 5th and 14th Amendments of

the Federal Constitution (and) in light of *Mapp*, *Ker*, and *Preston* cases, supra?

15. Whether an alleged "arrest" for a minor traffic infraction, for which Michigan law authorizes mere issuance of a Summons, authorizes a search of the individual's or driver's automobile when there is no suspicion or probable cause to believe that any other crime is being committed and it is evident upon its face that such a search and seizure cannot in any way produce evidence bearing on the offense for which the individual/s was/were "arrested"?

16. Did the Michigan Supreme Court err in: Failing to consider appellant's re-briefing material submitted on the last appeal? In actually considering material in the original briefs when it had ordered a complete rebriefing of the case on present appeal? In considering mere allegations contained in appellee's briefs and in Brief Amicus Curiae by the State Bar of Michigan—Committee on Criminal Jurisprudence (Comprised mostly of prosecuting attorneys), as evidence, unsupported by any official or certified congressional committee reports, minutes/transcripts of meetings, etc. set-forth in an appendix (of which there was none)? In failing to consider the material in appellant's current/-latest briefs and in the Brief Amicus Curiae of the Civil Liberties Committee of the State Bar of Michigan?

17. Did the Michigan Supreme Court deny appellant due process of law under the 4th, 5th and 14th Amendments of the Federal Constitution by misapprehending, misconstruing and failing to fully and fairly present in its controlling opinion/s, the facts as stipulated to and presented, as well as appearing in the record, concerning/involving the "arrest" of appellant and the search and seizure of

alleged items from his automobile and no Federal or Michigan cases presented as pertinent having held such facts as presented, sufficient upon which to justify, or hold reasonable and constitutional, a search and seizure such as herein conducted?

18. Did the Michigan Supreme Court deny appellant due process and equal protection of the laws under the 4th, 5th and 14th Amendments of the Federal Constitution, in light of *Mapp, Ker,* and *Preston* cases, supra, in reversing/overruling the trial Judge who had rendered an opinion at trial that before the trunk lid of appellant's car was opened the officers had no reasonable grounds to believe that a felony had been committed by either of the two men or that they were committing a felony in their presence?

19. Did the Michigan Supreme Court err and deny appellant due process and equal protection of the laws under the 4th, 5th and 14th Amendments of the Federal Constitution in deciding his case in conflict with, on misinterpretation or misapplication of Federal and State Authorities, case law and precedents, statutes and aforesaid constitutional provisions, and according to wrong principles/erroneous assumptions of fact and law concerning reasonableness/constitutionality of the search and seizure—all of which resulting in an erroneous controlling opinion or opinions and depriving appellant of a full, fair and complete adjudication of his appeal/remand in light of *Mapp, Ker* and *Preston* cases, supra?

20. That the decision of the Michigan Supreme Court represents a miscarriage of justice, is unconscionable, is a subtle evasion and erosion of various fundamental legal, statutory and Federal constitutional principles and rights under the 4th, 5th and 14th Amendments, guaranteed to

appellant and many other Michigan Criminal defendants, as well as citizens, and the result reached below is unduly harsh and far reaching in its impact, establishing conflicts between the decisions of that Court and the United States Supreme Court; the State Court practically rejecting the contentions of appellant that the State laws and constitution herein did and still do violate the aforesaid Federal Constitutional Amendments and cases cited.

21. Is the Michigan Constitutional Exemption Provision in Article II, Section 10, now Article I, Section 11, invalid and unconstitutional, and in derogation of the 4th, 5th and 14th Amendments of the Federal Constitution on the further ground of changing or changed conditions to which it originally applied—although it may have been justified and perhaps even "valid", when enacted? Are their provisions/terms conflicting, ambiguous and vague and hence void?

STATE CONSTITUTIONAL PROVISIONS INVOLVED

MICHIGAN CONSTITUTION OF 1908,

As Amended 1936 and 1952, Article II, Section 10:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation: *Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any narcotic drug or drugs, firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell,*

explosive, black jack, sling shot, billy, metallic knuckles, gas ejecting device or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state."

MICHIGAN CONSTITUTION OF 1964

Article I, Section 11

"The persons, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause supported by oath or affirmation. *The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a police officer outside the curtilage of any dwelling house in this state.*"

It should be noted that not only are the foregoing Michigan Constitutional provisions vague and ambiguous—by (1) providing against unreasonable searches and seizures and (2) not providing against unreasonable searches and seizures outside the curtilage of the dwelling house when carrying certain items, Article I, Section 11, also fails to include in its requirements for issuance of a search warrant the word "person" but merely provides "no warrant to search any place . . . or to seize any person or things . . . shall issue without describing them, nor without probable cause, supported by oath or affirmation." Said provision, therefore, does not give guarantees commensurate with the fundamental rights bestowed upon all citizens of the United States by the Federal Constitution, Amendment Four.

STATEMENT OF THE CASE

In order to fully apprise this Honorable Court of all the facts, events and proceedings of and in the case, appellant repeats in part and sets facts forth herein as they appear in his briefs on original appeal of the cause, being *People v. Winkle*, 358 Mich. 551, with necessary additions entered herein to encompass all subsequent events, proceedings, etc., leading up to the present status of the case (figures in parentheses refer to pages of joint appendix unless context clearly indicates otherwise):

"On July 21, 1957, at approximately 2:00 a.m. (15a), petitioner/appellant George H. Winkle (hereinafter called Winkle), accompanied by Lee Casteel, was traveling west on US-223, south of the City of Adrian, Michigan. As they approached the intersection of US-223 and M-52, the traffic light regulating the intersection turned amber, Winkle came to a stop on the corner of US-223 and M-52, the north and south roadway, and then before the traffic light turned green, made a left hand turn on to M-52 and proceeded south for approximately 100 feet and made another left hand turn into the driveway of the Rock Inn Motel (18a, 65a).

"Winkle had a few minutes prior, caused a telephone call to be made to the Rock Inn Motel to determine the availability of accommodations on the particular night (46a). As the Winkle car proceeded up the drive of the Rock Inn Motel they were approached from behind by a Michigan State Police patrol car carrying two Michigan State Troopers. The officers honked their horn twice as they approached the Winkle car and the Winkle car came to a stop, (47a) in the driveway, 20 feet east of the office of the Rock Inn Motel (19a). Mr. Winkle got out of his car and proceeded to walk towards the Michigan State Police

car. The driver of the State Police car, Trooper Robert Golm, walked towards the Winkle car and met Winkle somewhere in the vicinity of the rear bumper of the Winkle car (48a).

"Trooper Golm requested Winkle's driver's license, and informed Winkle that they were stopping his car for disobeying the red light (20a), (49a). Winkle displayed to Trooper Golm a driver's license bearing the name of George Henry Winkle. He also displayed a certificate of registration for the automobile which he was driving, in the name of Henry Williams (21a). Winkle explained the car was his brother-in-law's (39a). Therefore the name on the registration was different than on his driving license. Trooper Golm also requested information from Winkle as to his destination. While this conversation was occurring between Trooper Golm and Winkle, the other Trooper, Anthony Pandol, was talking to Lee Casteel, the other occupant of the car (66a). The Troopers then switched, Trooper Golm going over to talk to Casteel and Trooper Pandol going over to talk to Winkle (66a).

"Shortly after this, Trooper Golm returned and talked with Winkle and had by this time been given conflicting statements as to destination, purposes, etc. At this point, Trooper Pandol, without any knowledge of the conflicting statements made to Trooper Golm and without any instructions from Trooper Golm, walked up to the Winkle car, removed the key from the ignition and without asking or receiving permission from any person present," (and without having informed either Winkle or Casteel, or both, that they were then and there under arrest for any specific crime) "proceeded to open the trunk and make a search of the contents (24a, 25a, 53a, 67a). Such search, as testified to by both officers, was a routine procedure (76a) and was not done because

there was a suspicion that a felony had been, or was being committed (52a, 54a, 55a, 79a).

"Upon the trunk being opened by Trooper Pandol, Trooper Golm who was standing to the side, saw therein two crowbars and a large electric drill. At this time Trooper Golm took out his handcuffs and handcuffed Winkle. Trooper Pandol seeing Trooper Golm take this action, did likewise with Casteel (24a, 26a, 56a). At this time, Trooper Golm advised them that they were under arrest for possession of burglary tools (56a). At no time prior to this had Casteel and appellant been advised they were under arrest (56a). The parties were placed in a State Police patrol car and a wrecker was called to remove the Winkle car to the State Police post at Blissfield, Michigan.

"At the police post, a more complete search was made at a later time. Trooper Golm and Trooper Pandol took Winkle and Casteel to the Lenawee County Jail where they made a check of Winkle's and Casteel's personal possessions and checked their prisoners into the jail.

"At approximately 8:00 the next morning, Trooper Golm having returned to his post at Blissfield, Michigan, wrote out a traffic summons against Winkle for failure to observe a traffic light at the corner of US-223 and M-52. This summons was duly delivered to Winkle on Monday (57a) July 22, 1957. The appellant George Winkle, subsequently pleaded not guilty to the charge embodied in the traffic summons, and was tried before a Justice Court jury with a verdict returned of guilty. That verdict was subsequently appealed to the Lenawee County Circuit Court. Following the rendition of the verdicts in the Lenawee County Circuit Court from which this appeal was first taken appellant entered a plea of guilty to the traffic charge in the Lenawee County Circuit Court.

> "A further search at the Blissfield post of the Winkle car disclosed a concealed weapon, a 38-caliber revolver. Other tools were disclosed which, in the opinion of those who testified collectively constituted burglary tools (26a-30a)."

Appellant believes that it is important at this juncture to point out to this Court that there was abundant testimony given by both of the "arresting" Michigan State Police Officers during the preliminary examination and trial of the cause in the State Courts to clearly indicate that this specific "arrest" and search and seizure made of appellant's car herein, as well as similar searches and seizures made of many other motorists' cars stopped on Michigan highways in the early hours of the morning for infractions of minor traffic laws or rules were—*'A matter of routine and departmental policy.'*

Appellant incorporates herein by reference as though fully set-forth herein said pertinent excerpts of testimony given by said "arresting" officers, attached hereto as *Appendix-AA, Pages 1-7*, infra, and appellant requests that the Honorable Justices read said transcript of testimony before proceeding further with the reading of this Statement.

• • •

Nevertheless, and in spite of the aforesaid clear and unequivocal testimony by the "arresting" officers that the search and seizure herein was purely a matter of routine and departmental policy, made without a search warrant and without cause probable or reasonable grounds to believe that a felony had been committed or was being committed by the occupants of the car in the officers' presence—all items/articles thus illegally and unreasonably seized, in the Federal Constitutional sense, were admitted and

allowed into evidence at the Preliminary Examination held on August 2, 1957, and at the Trial on January 31, 1958, over timely, proper, repeated and cogent objections of defendant's/appellant's counsel. (14a, 15a, 25a, 26a, 27a, 28a, 29a, 30a, 37a)

In addition to aforesaid, prior to trial, on December 31, 1957, a Motion to Suppress the items seized from appellant's car on the grounds that said articles were unlawfully seized: (1) without search warrant, (2) by force without consent of owner when not under lawful arrest, (3) without cause probable to place defendants under arrest, (4) after making forcible entry into trunk of defendant's car, (5) without reasonable belief that prior thereto, defendant had committed a felony or was in process of committing one,— Upon due Hearing held in Lenawee County Circuit Court, was denied by said Court.

The Information against the appellant for carrying a concealed weapon and the Information against him for possession of burglary tools were consolidated for trial purposes, by stipulation of counsel.

Appellant, George Winkle, was tried on January 31, 1958, before the Honorable Rex B. Martin, Circuit Judge for Lenawee County Michigan. The right to jury was waived.

The said Trial Court and Judge found/held that the arresting officers legally stopped defendant/appellant Winkle for a traffic law infraction and as part of its verdict/-opinion in convicting the defendant held as follows: (Appendix A-1)

> "The Court finds as a matter of fact, that the Troopers were suspicious because of the difference between the stories of these two men, and the identification. (83a)

"But at the time they were talking to them, before the trunk lid was opened, they had no reasonable grounds to believe that a felony had been committed by either of these two men. They had no reasonable grounds to believe they were committing a felony in their presence. (83a, 84a)

"I might say parenthetically here, my criminal law professor at the University of Michigan Law School, who was a grandson of a United States Supreme Court Justice, frequently argued in our classroom the fact that if a weapon was actually concealed in the car, a felony was being committed in the presence of the officer, whether he knew it or not. (84a)

"Therefore, he was subject to lawful search. The search became lawful *Nunc Pro Tunc* when they found a felony was being committed in their presence. (84a)

"Apparently that's never been urged to the Supreme Court, and has never been ruled upon by the Supreme Court. (84a)

"I find further that the Trooper, without requesting permission to take the key and open the trunk and without voluntarily being given that permission, did take the keys to the car and opened the trunk." (84a) And, as further revealed by testimony, seized therefrom the disputed items/articles allowed into evidence at trial and upon which both convictions herein were had.

Since the Court found that the search and seizure did not violate the search and seizure clauses of the Federal and State Constitutions, all evidence seized by virtue of such search was admitted: The verdict of guilty on charge of Possession of Burglar Tools and on the charge of Possession of a Concealed Weapon was entered against George Winkle herein.

Following his convictions, the Lenawee County Circuit Court imposed sentences upon appellant of 4-5 years for Carrying a Concealed Weapon and 5-10 years for Possession of Burglar Tools. Appellant has been incarcerated and served time on said sentences since on or about January 4, 1960 to June 12, 1962, at which time he was released on bail, primarily because of the mandate issued by this Court remanding the cause for consideration in light of *Mapp* v. *Ohio*, supra.

Following his convictions aforesaid, within the time prescribed by Michigan law, appellant timely sought Leave to Appeal said verdicts in the Michigan Supreme Court, no Right to Appeal existing at said time under Michigan law and/or procedure. Leave to Appeal was granted by said Court—by its Order dated July 18, 1958. Thereafter briefs were submitted by both sides and appellant presented the following issues for determination on Appeal: (1) Whether informing of an infraction and mere questioning by police officers following a traffic rule infraction committed in the officers' presence constitutes an arrest? (2) Whether an arrest for a traffic infraction authorizes a search of the individual's automobile when there is no suspicion of any other crime being committed and it is evident upon its face that such search cannot in any way produce evidence bearing on the offence for which the individual was arrested? (3) Is Article II, Section 10 of the Michigan Constitution of 1908 as Amended in derogation of Section I Amendment XIV of the U. S. Constitution and therefore void? Appellant, in conjunction with aforesaid made argument that all evidence presented against defendant/appellant herein was obtained as a result of an unreasonable search and seizure, and should have been excluded and that the Michigan Con-

stitutional Exemption proviso was unconstitutional under the 4th and 14th Amendments of the Federal Constitution.

The Michigan Supreme Court in rendering its decision/opinion on the first Appeal of this cause herein, rejected all of defendant's/appellant's contentions above and in *People* v. *Winkle*, 358 Mich. 551 (Appendix A-3), stated at page 554 that:

> "In *People* v. *Gonzalas*, 356 Mich. 247, this Court recently unanimously held (except for Mr. Justice KAVANAGH, who did not sit) that the noted Amendment to our Constitution did not offend the United States Constitution or any of its Amendments.
>
> "Since our decision in *Gonzalas* it appears that once it has been determined that the search and seizure has occurred, in the words of the Amendment, 'outside the curtilage of any dwelling house in this State' and once it has further been determined that the articles seized and offered in evidence in a criminal proceeding are among those enumerated in that Amendment (both of which are so here) *then the circumstances of the arrest and of any search or seizure, or the frequently prickly question of whether or not the 'search and seizure' was 'unreasonable' appear to become totally irrelevant in any phase of the criminal case.* As Mr. Justice SMITH tersely wrote in *Gonzalas* (p. 264): 'When we conclude that . . . [the Amendment] is not repugnant to the Constitution of the United States, we have disposed of the case before us.' The question is whether there are circumstances in this case, properly brought before us by the records and briefs, which take it without the broad rule of *Gonzalas*. We think there are none." (Emphasis ours)

The Court then engages itself in some sort of legal

rhetoric, foreign to and abortive of the Federal Constitutional provisions as to Due Process, Equal Protection of the Laws and reasonableness/constitutionality of searches and seizures under the 4th and 14th Amendments. The Court finding or strongly inferring (page 555-556) that the search for and seizure of some of the articles from Winkle's car trunk and not embraced by said Article II, Section 10, might have been unreasonable and unconstitutional and that it was not wise, or would not be wise in similar cases for the prosecutor to consolidate different charges on the same information and/or for trial and to introduce and to allow into evidence in lump form, some articles exempted and some articles not exempted under the proviso . . . which could unduly sway a jury or unduly prejudice the defendant were a jury trial to be had. At p. 556 the Court finalized:

> " . . . we are not going to assume that the Circuit Judge, sitting without a jury, was unduly swayed, or that the defendant was unduly prejudiced by the *possible erroneous admission* (which we do not pass on) of certain additional articles along with other articles that were admissible *regardless of the possible illegality of the search.*" (Emphasis ours)

There can be little doubt from the said Court's own foregoing words and those that will be further cited below that were it not for the Art. II, Sec: 10 proviso, the arrest and search and seizure herein would have been found to be illegal, unreasonable and in violation of Federal Constitutional proscriptions. The Court tersely and strongly denounced the routine searches and seizures engaged in by the Michigan State Police as a matter of departmental policy in searching cars "legally" stopped for *minor* traffic offenses, such as herein made at 2 a.m.; stating further at page 557, that:

> "This is the second time in a few months that questioned searches of this kind have come before us. *Ganzalas* was the other. We do not understand that either the noted Amendment or our decision in *Gonzalas* authorizes the police to become motorized inquisitors or to make indiscriminate searches of persons or cars following their legally being stopped for minor traffic offenses. If this is indeed the settled policy of the State police or others, we suggest that it forthwith be reviewed and that the practice cease."

The Appellee's brief filed for the *People* by the Attorney General of Michigan stated at page 2, that:

> "It is conceded that under existing Departmental Policy, the search would have been made regardless of the existence or non-existence of reasonable cause to do so."

Thereafter, after affirmance of his convictions above, appellant filed in the Supreme Court of Michigan a petition for writ of habeas corpus and certiorari to the Circuit Court of Lenawee County, which was denied without opinion by said Court on April 26, 1961 (Appendix A-11). On May 12, 1961, appellant, in pro se, filed a petition for writ of certiorari to the Michigan Supreme Court in the office of the clerk of the United States Supreme Court seeking review of the order denying habeas corpus and certiorari above stated.

The Supreme Court of the United States decided the case of *Mapp* v. *Ohio*, 367 U.S. 643, on June 19, 1961.

The Attorney General of Michigan filed a Response of the People of the State of Michigan to the Appellant's Petition For Writ of Certiorari aforesaid—claiming that on basis of *People* v. *Gonzalas*, *supra*, the Art. II, Sec. 10 exemption proviso of the Michigan Constitution was not

repugnant to the United States Constitution and that appellant's convictions were affirmed on that ground (358 Mich. 551, 554), and further stated in said Response—urging upon this Court the following propositions:

> "Prior to June 19, 1961, this would have been sufficient to dispose of petitioner's petition before this Court on the basis of the *Wolf* decision, supra. However, with the advent of *Mapp* v. *Ohio*, 367 U.S. 643, there appears to be a conflict with the holding in *Wolf* v. *Colorado*, supra. It is the contention of respondent that before this Court attempts to review the question of repugnance of the 1936 and 1952 amendments to Article II, Sec. 10 of the Michigan Constitution to the Fourth and Fourteenth Amendments of the United States Constitution, in the light of the *Mapp* case, the Michigan Supreme Court should first be given the opportunity to review the applicability of the *Mapp* decision to the aforementioned Amendments of the Michigan Constitution; the reason being that petitioner in seeking his writ of certiorari bases it primarily upon the decision of this Court in *Wolf* v. *Colorado*, and as the Michigan Supreme Court has said in *People* v. *Simon*, 324 Mich. 450, 456:
>
> > "In consideration of Federal Constitutional questions we are bound by what a majority of that Court has heretofore held, not by speculations as to what it may do in the future."

The Supreme Court of the United States on November 6, 1961, entered an order/mandate thereon as follows: (Appendix A-12)

> "The Motion for leave to proceed *In Forma Pauperis* and the petition for certiorari are granted. The judgment is vacated and, as suggested by the Attor-

> ney General of Michigan, the case is remanded for consideration in light of *Mapp* v. *Ohio*, 367 U.S. 643."

Upon receipt of the mandate from the Supreme Court of the United States, the Supreme Court of Michigan on the 11th day of December, 1961, entered an order as follows: (Appendix A-12)

> "Upon receiving and filing the mandate of the Supreme Court of the United States in this cause, it is ordered that the order heretofore entered herein on April 26, 1961, denying habeas corpus and certiorari to the Circuit Court of the County of Lenawee be and the same is hereby vacated and held for naught and that the cause be rebriefed and submitted to this Court for reconsideration in the light of *Mapp* v. *Ohio*, 367 U.S. 643."

Appellant completely rebriefed the cause as above ordered, submitting his First Brief on November 20, 1962, after the Attorney General had submitted the brief of respondent. Upon oral argument made before said Court on February 7, 1963, the Attorney General claimed he needed more time to submit further briefs on the Question of the reasonableness of the search and seizure. which the Court allowed. The Supplemental Brief for respondent was filed February 25, 1963. Appellant's Supplemental Brief was filed on August 16, 1963. The Appeal was not decided until February 3, 1964.

(HOW THE FEDERAL QUESTIONS ARE PRESENTED)

Appellant duly and properly raised, briefed and argued on said Appeal the following Federal Constitutional Questions which the Michigan Supreme Court, with but one exception, either declined to rule upon, decide or opine about or decided same adversely to appellant. Appellant

contended that his convictions were improper and void because had and obtained in violation of his Federal Constitutional Rights and he raised the following Federal Questions?

1. The Search and Seizure Exemption Provision contained in Article II, Section 10, of the Michigan Constitution is by reason of *Mapp* v. *Ohio*, repugnant to, in conflict with and in derogation of the Constitution, statutes and laws of the United States, and is not a proper exercise of the police power of the state but is unconstitutional and void (naming the 4th and 14th Amendments.).

2. *Mapp* v. *Ohio* can and should be retrospectively/retroactively applied so as to require release of petitioner herein, whose attack on his conviction in the nature of an appeal was pending in the United States Supreme Court before *Mapp* v. *Ohio* was decided and who had timely complained of the unconstitutionality of Article II, Section 10, and of the unreasonable search and seizure and had moved for suppression of the evidence upon which he was convicted at every stage of the proceedings below and on appeal.

3. Assuming arguendo, that Article II, Section 10, as Amended, is in conflict with and in derogation of the Federal Constitution by virtue of *Mapp* v. *Ohio* and that *Mapp* must be applied retrospectively to petitioner's case, then without the benefit of said nonexclusionary proviso/rule the search and seizure of the articles from petitioner's automobile was unlawful and unreasonable under the circumstances of the case, no probable cause existing therefor or for his arrest and such evidence should have been suppressed at trial and should now be suppressed and petitioner discharged.

A. The petitioner's Constitutional rights granted him under the 4th, 5th and 14th Amendments were (would be) violated and he was (would be) denied due process of law by allowance of introduction/admission into evidence all alleged items illegally or unreasonably searched for and seized as an incident to issuance of a summons for a motor vehicle code or traffic violation and while petitioner was not under arrest for commission of a felony and no probable cause existed therefor.

B. The search and seizure under the facts and circumstances of the case was/is under existing Michigan and/or Federal law, unlawful and unreasonable and the trial Court in its judgment/verdict/opinion so held and the Michigan Supreme Court in its opinion/decision on Appeal also so held, but affirmed the verdicts/convictions on basis of other reasons and grounds.

The Michigan Supreme Court in its decision/opinion on said Appeal (on remand) in *People* v. *Bannan*, 372 Mich. 292, 125 N.W. 2d 875 (Appendix A-14) again affirmed appellant's convictions but apparently split 3 ways, 2, 2 and 3, in doing so. The Justices apparently split 5-2, however, in *not* deciding the challenged constitutionality on Federal grounds of the Michigan Article II, Section 10, now Article I, Section 11, constitutional search and seizure exemption proviso. The Justices, in 3 separate, varying and conflicting opinions decided on basis of erroneous, arbitrary, misconceived/misconstrued or newly created or differently interpreted theories, principles, constructions of State and/or Federal laws, that the arrest, search of and seizure of articles from appellant's car were lawful and reasonable and that said . . . "Court has repeatedly held that Constitutional questions will not be passed upon where other ques-

tions are raised which dispose of the case." (at pages 882, 893, 894)

The said Justices, as was stated before, then radically split three ways in attempting to supply valid and cogent authorities to support their varying stands in upholding the validity, legality and reasonableness of the arrest and search and seizure herein. Basic and common to all three divergent views, trying to establish probable cause in their own fashion, was the underlying misconception that *Ker* v. *California*, supra, left to the States the right, power and freedom to maintain and/or to establish their own search and seizure laws or rules *outside* of the framework of the protections, prohibitions, proscriptions now afforded, by virtue of *Mapp*, *Ker* and *Preston*, supra, under the 4th, 5th and 14th Amendments of the Federal Constitution. As will be shortly pointed out, the three separate opinions upholding the arrest, search and seizure herein did so strictly on basis of state law (now herein revised to suit the exigencies of the case) apparently refusing wholeheartedly to recognize that search and seizure is now a Federal Question and that freedom from invasion of one's privacy is a fundamental right, a civil liberty, entitled to all the protections and guarantees bestowed by the 4th, 5th, and 14th Amendments of the Federal Constitution as well as laws/cases interpreting same.

The Honorable Justices of the Michigan Supreme Court in appellant's case herein established the following new propositions, theories and principles of law regarding arrest, probable cause, reasonableness/validity/constitutionality of searches and seizure and allowance into evidence at trials of articles seized in conjunction therewith—quoting hereinafter at length from said decision of *People* v. *Bannan*, supra.

Justices Kelly and O'Hara, in apparently holding the search and seizure herein reasonable did so on basis not even understandable to Justice Souris, who in his concurring opinion stated at page 893:

> "While agreeing with my brothers *Kelly* and *Dethmers* that the search and seizure here involved were reasonable within federal and state constitutional meaning, I am not sure I understand the basis upon which Justice Kelly reaches that conclusion nor am I in agreement with Justice Dethmers' statement that the search and seizure were reasonable because 'based upon probable cause on the part of the officers to believe that *there was in the automobile, or might be, evidence that a crime had been or was being committed.*' (italics added)"

Justices Kelly and O'Hara then go on to determine, even though the usual procedure in Michigan is to merely issue a summons in such cases and not to place the offender under arrest, (see Testimony of Troopers Golm and Pandol, Appendix-AA infra) that Winkle nevertheless should at all times have known he was under "arrest" when stopped for a minor traffic infraction and should have conducted himself accordingly (pages 879-880) and the officers, therefore, on that basis had authority, per decisions of this Court, to make a routine search of Winkle's car trunk and to seize articles therefrom, stating at pages 880-881:

> "The officers clearly indicated their intent, by their acts, to place petitioner under their control. . . .
>
> "The facts and conflicting statements of petitioner and his associate were completely inconsistent and irreconcilable with those of innocent travelers on the highway. . . .

> "These facts would not only justify a law enforcing officer who was reasonably discreet and prudent to conduct the search that uncovered the nitroglycerine, detonator caps and a complete set of burglar tools, plus a concealed weapon, but were of such a nature that any failure to conduct the investigation, such as the troopers conducted in this case, would have constituted action that would justify reprimand for failure to carry out their duty."

A complete and radical departure from said Court's earlier denouncement of the same acts done, and routine search made by these same officers and who were earlier branded by this same Court as *Motorized Inquisitors* in *Winkle's* first Appeal, 358 Mich., at p. 557.

Justices Kelly and O'Hara, did however acknowledge (at p. 878) that under *Ker* v. *California*, supra, . . . "Reasonableness is in the first instance for the trial court to determine."

Justices Dethmers and Black, in their separate opinion, found the arrest and search and seizure herein *not* to be unreasonable or unlawful on the following basis: (at p. 392)

> "For the reasons stated in the first portion of Mr. Justice Kelly's opinion, holding that the search and seizure were not unreasonable or unlawful for the reason that they were based upon probable cause on the part of the officers to believe that there was in the automobile, or, might be, evidence that a crime had been or was being committed[1], I concur in affirmance of this court's order of April 26, 1961, denying petition for writs of habeas corpus and certiorari."

After criticizing, as pointed out above, the bases of the

two foregoing separate opinions for concluding that probable cause existed for making the search and seizure herein, Justices SOURIS, KAVANAGH and SMITH rendered their separate opinion, concluding that a search could be made by police officers without a warrant when a crime, either a felony or a misdemeanor, was being committed by appellants in their presence or upon probable cause to believe that appellants had committed a felony, citing *People* v. *Kuntze*, 371 Mich. 419, 426, 427, 124 N.W.2d 269, 273, 274, Applying this case to Winkle's arrest, and search and seizure situation herein, the said (3) Justices concluded: (pages 893-894)

> "The record before us in Winkle, including petitioner's own statement of facts from which Justice Kelly has quoted at length, amply supports our finding that this search and seizure of Winkle's car were constitutionally justified within the Court's holding in Kuntze and the authorities therein relied upon. *At the time the search commenced, from their interrogation of defendant and his companion the troopers had probable cause to believe (whether they actually did so believe is beside the point in determining the reasonableness of the search and seizure) that the automobile had been stolen.* They then knew that the automobile was not owned by either occupant; that, although defendant claimed to be a resident of Indiana, he carried a Florida driver's license; and that because of the conflicting stories the occupants of the car told the troopers, either or both occupants had lied about their residences and their destinations. Considering also the fact that the trooper's encounter with the defendant and his companion occurred at 2 o'clock in the morning and that their interest was aroused initially by the defendant's *haste* in making a turn in violation of a traffic con-

> trol signal, I cannot conceive, any more than Justice *Kelly*, what justification there could have been had the troopers failed to make a search such as they did make."

Because of the above opinion, appellant has been forced to set-forth, at great length, *Appendix-AA* infra, the testimony of the two "arresting" State Troopers given by them at Preliminary Examination and Trial of Winkle's cause herein—relative to their reasons for making the arrest and search and seizure at the time. This Court should note, that nowhere therein, did the said Troopers testify, as Justice SOURIS asserts in his opinion above, that they at any time suspected or considered Winkle's car to have been stolen or that he was detained for that reason or for investigation thereof. Nowhere does it appear that they at any time considered Winkle's turning aganst the red light at the time made, to have been made in *haste* for any ulterior motive, purpose or reason other than an ordinary, usual and human traffic rule violation. Actually, one of the Troopers testified that at that precise time two traffic violations were committed simultaneously in his view by two motorists, but that he decided to go after the easiest to apprehend—namely Winkle herein.

The entire opinion appears to be replete with after-the-fact meanings and intentions attached to actions of Winkle and to events which either did or did not occur, except perhaps inferentially, in order to attempt to establish probable cause to justify the reasonableness and lawfulness of the search and seizure. Federal Constitutional tests seem wholly to be avoided, omitted and disregarded.

As stated before, the Michigan Supreme Court then avoided (in a 5 2 opinion) deciding the Constitutionality

under the 4th, 5th and 14th Amendments of the Federal Constitution of the said Article II, Section 10, now Article I, Section 11, Search and Seizure Exemption Proviso of the Michigan Constitution and it now stands in effect in Michigan to be enforced alongside of the 4th Amendment, although clearly repugnant to and in derogation of its terms. Two Justices, Kelly and O'Hara, in a lengthy opinion, seemed to have held that the noted Article II, Section 10, now Article I, Section 11, is Constitutional and can and must be upheld under the Federal Constitution by virtue of *Ker* v. *California*, supra, said proviso alleged to be a valid exercise of the Police Power of the State, expressed and enacted by the will of the People of the State of Michigan, hence placed beyond and not affected by the mandates/commands of *Mapp* v. *Ohio*, supra, by virtue of the 10th Amendment of the Federal Constitution (at pages 882-892); see particularly pages 890, 891, 892). This opinion so held in spite of appellant's claims that the said proviso's terms are repugnant to and in derogation of the 4th Amendment of the Federal Constitution—the Court stating:

> "'Mapp does not outlaw the Michigan proviso, because the proviso is a reasonable application of the leeway Mapp and Ker reserve to the States to work out their own rules so long as they do not condone unreasonable search and seizure. And the proviso, read and interpreted as above, does not do that . . . The Tenth Amendment to the United States Constitution should not be overlooked. . . .'" (page 890)

> "In the writer's opinion, our decision in Gonzalas, namely, that we had the right and duty to honor the People's command as expressed in their Constitution, was forcibly expressed by the then Justice Talbot Smith (now United States District Judge, Sixth Circuit) when he wrote (356 Mich. p. 264, 97 N.W.

2d p. 24): . . . 'The. Constitution does not define liberty, nor do we. In an absolute sense it does not exist. . . . ' ", etc. (page 891)

"The common law did not sanction the exclusionary rule." (page 891)

"The Michigan proviso does not condone illegal search. It was an expression by the People of this State to the citizenry that if they have in their possession, outside the curtilage of their dwelling, drugs, firearms, or dangerous weapons, or things, *said possessor would not have the right to question the legality of the search as a defense to illegal possession.*" page 892—emphasis ours)

"The difference between laws and facts applicable to Mapp and Winkle; the lack of unanimity apparent in the decision of Mapp, plus that decision's absence of conclusions which apply to the Michigan proviso, and our unanimous decisions in Gonzalas and Winkle to the effect that our proviso did not violate the United States Constitution, causes the writer to recommend that this court by proper order reaffirm its previous decision reported in 358 Mich. 551, 100 N.W. 2d 309, *People* v. *Winkle.*" (pages 891, 892)

Appellant's Motion for Re-hearing of Appeal of above cause, attacking the judgment/decision of the Court and of the conclusions/opinions therein rendered and as set forth above and in *People* v. *Bannan*, supra, was denied by the Court, without opinion, on March 4, 1964, occurring within two weeks after it was filed. (Appendix A-55)

THE QUESTIONS ARE SUBSTANTIAL

This Honorable Court can and should take Jurisdiction of the cause for a number of reasons—all of which are of general importance, not only to this Court and appellant

herein, but to all defendants in criminal proceedings as well as to all citizens/motorists travelling on the roads and highways in the State of Michigan and in the United States.

The Michigan Supreme Court was ordered by mandate of this Court dated November 6, 1961, to decide the case in light of *Mapp* v. *Ohio*, supra, upon urgings of the Attorney General of the State of Michigan who requested that the Michigan Supreme Court be allowed to re-determine the Constitutionality, in the Federal sense, of the Michigan Constitutional Search and Seizure Exemption Proviso, Article II, Section 10, under and by virtue of which authority appellant's original convictions were sustained by said Court. Winkle had challenged the constitutionality of said proviso in his petition for certiorari pending in this Court, which he pursued in proper person. At the time of the Attorney General's aforestated request, therefore, Winkle was without benefit of and advice of counsel and it is safe to assume that had he had counsel, he would have opposed the Attorney General's request for remand. Winkle as an inmate in prison was not sufficiently trained, informed nor skilled in law to know what to do.

As the matter now stands and as the same has evolved and resulted, the Michigan Supreme Court did not abide by the Attorney General's request as made of this Court and did not decide the Constitutional validity of said Article II, Section 10, and moreover did not decide Winkle's remand/-appeal on mandate in light of *Mapp* v. *Ohio*, supra. The Michigan Supreme Court instead, asserted in *People* v. *Bannan*, supra, at pages, 882, 892, and 894, in three separate opinions, that Constitutional questions will not be passed upon where the case can be disposed of on non-federal grounds, and declined to make a determination of the con-

stitutionality of said proviso but determined and decided the legality/reasonableness of the challenged arrest and search and seizure herein and upheld same on claimed non-federal and independent State grounds. The Court further upheld appellant's convictions on entirely new and/or different interpretations of the facts and further upheld same under and by virtue of newly created law, different theories or principles of law and/or new/different interpretations of prior existing state or federal laws (different than those upon which said Court's earlier affirmance of convictions was predicated).

This Court then, can and should assume Jurisdiction on any one or all of the various reasons, grounds, and authorities following; because:

(1) The decision/opinion appealed has been rendered by the highest State Court, and appellant has exhausted all available State remedies and procedures and the decision is therefore final under all the laws of the State of Michigan. 28 U.S.C. Sec. 1257; *Berman* v. *United States*, 302 U.S. 211;

(2) The Michigan Supreme Court has failed to follow the mandate of the United States Supreme Court and has in addition revalidated the State Constitutional Proviso, Article II, Section 10, now Article I, Section 11, and an independent basis for appeal is thereby furnished whereby to cure the departure from the mandate; See *Georgia Ry. & Elec. Co.* v. *Decatur*, 297 U.S. 620; *Deen* v. *Hickman*, 358 U.S. 57, 874;

(3) Substantial Federal Questions were duly, properly, fully and timely raised in all proceedings had and taken in the Michigan Courts, including Appeals of the cause

herein, but more in particular were raised in the State trial court as required by State procedure (See Statement of the Case, supra, and authorities to be cited, infra, and to be merged herein by reference); *Williams* v. *Bruffy*, 96 U.S. 176, 183; *Zucht* v. *King*, 260 U.S. 174; *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181; *Beck* v. *Washington*, 369 U.S. 541, 550; *Stern & Gressman*, infra, Sec. 3-27; *Rogers* v. *Alabama*, 192 U.S. 226, 230-1.

That even if defendant/appellant had not timely/properly raised the Substantial Federal Questions in the State Trial Court, defendant and/or his counsel then well knew that under then existing law objecting to the admissibility of evidence allowed to be introduced under Art. II, Sec. 10, Michigan Constitution, would have been a futile, useless and worthless act/gesture, as appeal of said question in his own case proved—*People* v. *Winkle*, supra. See *Hall* v. *Warden*, 313 F. 2d 483, 201 F. Supp. 639.

(4) The State Supreme Court was not explicit in overruling/deciding a timely and explicit challenge made by appellant on federal grounds to the validity/constitutionality of the Michigan Constitutional Proviso, Art. II, Sec. 10, now Art. I, Sec. 11; See *Largent* v. *Texas*, 318 U.S. 418; See also *Stern and Gressman*, Supreme Court Practice, 3rd Ed., Sec. 3-4, pages 67 and 65, where is also stated respectively:

> *"Thus an erroneous failure to pass on the federal Constitutional objections to the State statute is treated as equivalent to a finding of validity within the meaning of Sec. 1257(2), so that an appeal will lie. Lawrence v. State Tax Commission, 286 U.S. 276, 282-3." (p. 67)*
>
> *"The reference in Sec. 1257(2) to a 'Statute of*

any State' has been defined many times to include every legislative action to which a state gives the force of law. See Williams v. Bruffy, 96 U.S. 176, 183. This definition covers much more than the laws passed by a state legislature. It also encompasses state Constitutional provisions, municipal ordinances and by-laws, . . . ", etc. (p. 65)

(5) To determine, if in fact the State Court's decision/opinion/verdict is (are) based upon non-federal grounds, and if so, to determine if those non-federal grounds will independently or adequately support the State Court's opinion/decision/verdict. (Appellant claims the decision/opinion/verdict herein were ambiguous); *Black* v. *Cutter Laboratories*, 351 U.S. 292; *Fox Film Corp.* v. *Muller*, 296 U.S. 207; *Enterprise Irrig. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 163-4; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290; *Irvin* v. *Dowd*, 359 U.S. 394, 403-404, 409 (Dissent); *Wood* v. *Chesborough*, 228 U.S. 672, 676-80; *West Chicago St. R. Co.* v. *Illinois ex rel Chicago*, 201 U.S. 506, 519-20; *Chicago, B & Q. R. Co.* v. *Illinois ex rel Comr's*, 200 U.S. 561. See, Stern & Gressman, supra, pp. 108-109 and cases cited top of page 109.

(6) This Court should reconsider the facts and review the State Court's findings, a Federal right having been denied as the result of findings shown by the record to be without evidence to support them; and/or conclusions of law as to Federal rights and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts and the duty rests upon this Court to decide for itself facts or constructions upon which federal constitutional issues rest, especially in a case such as herein where trial was had before the Judge without jury; *Fiske* v. *Kansas*, 274 U.S. 380, 385-6; *Creswill* v. *Grand Lodge*, 225 U.S. 246, 261; *Sterling* v. *Constantin*,

287 U.S. 378, 398; *Norris* v. *Alabama*, 294 U.S. 587, 590; *Chambers* v. *Florida*, 309 U.S. 227, 228-9; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-8; *Craig* v. *Harney*, 331 U.S. 367, 373-4; *Niemotko* v. *Maryland*, 340 U.S. 268, 271; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121; *Napue* v. *Illinois*, 360 U.S. 264, 271-2;

(7) Appeal is the appropriate remedy because in effect the State Court held said Art. II, Sec. 10 Constitutional Proviso valid in light of objections based on federal law; See *Stern & Gressman*, supra, Sec. 3-5, page 70; That Winkle's case herein probably presents several questions, some of which may be reviewable by Appeal and others perhaps only by certiorari and appellant can and will include herein in the questions presented on Appeal 'any other denial of federal right whether or not capable in itself of being brought here by Appeal,' in which event the non-appealable issues can and should be considered along with the merits of the appealable issue/s. See *Stern & Gressman*, supra, Sec. 3-6, page 73, citing: *Flournoy* v. *Wiener*, 321 U.S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547;

The Michigan Supreme Court has sustained appellant's convictions twice, on two separate appeals, spaced some 4 years apart, on basis of two entirely separate and distinct grounds, entirely unrelated and diametrically opposed, in the Federal Constitutional sense: (1) In *People* v. *Winkle* (358 Mich. 551) on authority of Art. II, Sec. 10 of Michigan Constitution Proviso not allowing any defense to be interposed to unreasonable search and seizure, provided defendant has in possession certain enumerated items when searched and (2) in *People* v. *Bannan* (372 Mich. 292) where the search and seizure and arrest of Winkle were apparently sustained on basis they were reasonable because probable

cause existed therefor and/or made as an incident to a lawful arrest—apparently on non-federal grounds. Winkle at all times attacked and challenged both of said Court's positions on Federal Constitutional grounds.

This Court should take jurisdiction to determine if in fact the State Court decisions are based upon non-federal grounds and to thereafter discover whether those grounds are adequate to support the verdicts/judgments/decisions without consideration of the Federal questions. In this regard, the Court applies its own standards in making its enquiry, which standards are encompassed/summarized in appellant's contentions below (See *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773; *Staub* v. *Baxley*, 355 U.S. 313, 318-319; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455); Appellant claims that:

(1) The non-federal ground is/was not broad enough, without reference to the federal question, to sustain the state court judgment/verdict/decision; *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Eustis* v. *Bolles*, 150 U.S. 361, 370;

(2) The non-federal ground was not independent of the federal question. Where the non-federal ground is so interwoven with the other as not to be an independent matter, as herein, this Court's jurisdiction is plain and the Court can herein render decision on all the related questions, federal and non-federal; *Enterprise Irrig. Dist.* v. *Farmer's Mut. Canal Co.*, 243 U.S. 157, 164; Cf. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290;

(3) The non-federal ground was not a tenable one but is/was a proferred non-federal ground so certainly unfounded in light of *Mapp, Ker and Preston*, cases, supra, that it properly may be regarded as essentially arbitrary or

a mere device to prevent review of the judgments/verdicts/-decisions upon the federal questions. *Enterprise Irrig. Dist.* v. *Farmer's Mut. Canal Co.*, supra, 164; and see *Ward* v. *Love County*, 253 U.S. 17, 22-23; *Postal Tel. Cable Co.* v. *Newport*, 247 U.S. 464, 476-8; *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282.

The Michigan Supreme Court had a clear duty to decide/-determine the challenged validity/constitutionality, on Federal grounds, of the Michigan Constitutional Proviso, Art. II, Sec. 10, now Art. I, Sec. 11, and had a further duty under the applicable Article VI and the 4th, 5th and 14th Amendments of the Federal Constitution and under the *Mapp*, *Ker* and *Preston* cases, supra, not to change the facts, grounds or theories of the case nor to change Michigan procedure and/or substantive laws in order to specifically uphold Winkle's convictions and/or whereby to *reconvict* him on basis of changed law, geared in effect, to evade the true meaning, intent and mandate of the Federal law, specifically covering the rights thus evaded. Nevertheless, the State Court, did so do, and in so changing the law found reasonable a search and seizure it had previously declared unlawful and unreasonable—perhaps not directly but strongly-inferentially. For these reasons appellant claims, and it should be so determined by this Honorable Court, that said State Court:

(1) Denied to him due process and equal protection of the laws under the 4th and 14th Amendments of the Federal Constitution; *Brock* v. *North Carolina*, 344 U.S. 424, 427, 428; *Hoag* v. *New Jersey*, 356 U.S. 464, 469-472 (Chief Justice Warren Dissent, pages 474-480).

(2) Subjected him to and did impose upon him Double Jeopardy, in violation of the 5th and 14th Amendments of

the Federal Constitution; *Brock* v. *North Carolina, Hoag* v. *New Jersey,* supra; *Green* v. *United States,* 355 U.S. 184.

(3) Was collaterally Estopped to relitigate the questions of fact essential to the judgment (and to change them) having been actually litigated by a final judgment—its first determination being conclusive on the second appeal. (Moreover, the said Court's first decision/opinion was Res Judicata the second determination of facts and issues on appeal and his convictions were constitutionally barred by "collateral estoppel") *Brock* v. *North Carolina,* and *Hoag* v. *New Jersey,* supra.

(4) Should now have its decision overruled and/or have imposed upon it an enforced waiver of the alternative grounds for the state judgment/verdict/decision not brought in issue (by it) in the earlier litigation and appeal; 56 *Yale Law Journal* 581 (1947), and see fn. 37.

(5) Found to have reaffirmed/upheld the convictions or re-convicted appellant on basis of decision/s inconsonant with the normal policies and substantive law of the state. *Yale Law Journal,* supra, page 582.

The search and seizure exemption provision contained in Article II, Section 10, now Article I, Section 11, of the Michigan Constitution is by reason of *Mapp* v. *Ohio,* supra, repugnant to, in conflict with and in derogation of the constitution, statutes and laws of the United States, and it is not a proper exercise of the police power of the State but is unconstitutional and void.

The decision and mandate of *Mapp* v. *Ohio,* has made the Fourth Amendment's right of privacy enforceable against the State through the due process clause of the Fourteenth Amendment and it is enforceable against them by the same

sanction of exclusion as is used against the Federal Government; at page 655, where it is also stated:

> "We hold that all evidence obtained by searches and seizures in violation of the constitution is, by that same authority, inadmissible in a state court." etc.

Being in conflict with the very terms of the 4th Amendment of the Federal Constitution and being in derogation thereof by their own terms, said Michigan Provisos find no counterpart whatever in the Constitution, statutes and laws of the United States and cannot now stand alongside and be enforced in conjunction with 4th and 14th Amendments under the terms and mandates of the *Mapp* case, now being the supreme law of the land.

Said Michigan provisos, in reality, actual practice and application permit absolutely no defenses, in or out of the Federal Constitutional sense, when the articles enumerated therein are seized from any *person* and/or any *automobile* outside the curtilage of the house even when seized by/in connection with an illegal arrest, or by force, arms, violence, intimidation, coercion, duress, trickery, fraud, subterfuge, etc., which causes of action and conduct by the police would ordinarily be valid/allowable defenses to the search and seizure. The best testimonial to this assertion that *no* defenses are available to searches and seizures made and upheld under these provisos is contained in his own first appeal of the case herein, 358 Mich. 551 (Appendix A-3)—upholding the search and seizure as illegal *per se* under said proviso without considering/allowing any challenge, test or defense on part of defendant to question the legality and reasonableness thereof. (See page 554)

Such a State Constitutional Search and Seizure Exemp-

tion Provision should not be allowed to stand as a threat to and denial of the rights and privileges guaranteed to citizens by the 4th and 14th Amendments or to be continued to be employed by the State in derogation thereof.

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant disagrees with the opinion of the Michigan Supreme Court expressed in *People* v. *Bannan*, 125 N.W. 2d 875, pages 882-892, that said Court must and can retain this constitutional search and seizure exemption proviso, even in the face of *Mapp* and *Ker* cases, supra, as an expression of the will of the People of Michigan and as a valid exercise of the State's police power and that it is needed by the State to insure and bolster effective law enforcement and to afford the police every opportunity to keep pace with the acumen, ingenuity and fast pace of criminals.

State laws and powers must yield to the supremacy of the Federal Constitution. See *American Jurisprudence* Vol. 11, Secs. 40, 41, 42 and 44, pages 646-652, where is stated:

> "Sec. 41. A State law, even if passed in the exercise of the State's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution. No act of a State legislature which is repugnant to the constitution of the United States can be of any validity. Even a State Constitution is of no effect where it is in conflict with the Constitution of the United States, *McCulloch* v. *Maryland*, 17 U.S. 316, at p. 406, 4 Wheat. (U.S.) 316, 4 L. Ed. 579. While every word of a state constitution should be

MICROCARD 22
TRADE MARK ®
MATTHEW BENDER & COMPANY
MB
PC 70
59-55
m
microcard

given its appropriate meaning and effect, yet the meaning and legal effect of words in a State Constitution may be restrained or modified by applicable controlling commands or limitations contained in the Federal Constitution. Within their proper sphere of operation, the applicable provisions of the Federal Constitution are to be regarded as the dominant authority in the interpretation and enforcement of provisions of a State Constitution."

"Sec. 40. The Constitution of the United States is by its own declaration, Article 6, Sec. 2, the supreme law of the land. It is binding on all officers, and departments of both the Federal and State governments, including every court, whether it derives its authority from a State or from the United States, governing and restraining their acts and conduct, whether exercised by their representatives in Federal Congress or by their representatives in state conventions and constitutions." (and see cases therein cited)

Whenever the constitutional powers of the Federal Government and those of the State come into conflict, the latter must yield . . . *Florida* v. *Mellon*, 373 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 265.

(Re: Reasonableness of Search and Seizure)

Even if it could validly be argued, and appellant doubts that it can, that the Michigan Supreme Court could fairly and validly avoid the challenged constitutionality of the Art. II, Sec. 10, Proviso, in view of *Mapp*, then the Federal question of the lawfulness/reasonableness/constitutionality of the search and seizure would still have to be considered and ruled upon in light of the 4th, 5th and 14th Amendments and the *Mapp*, *Ker*, *Preston*, etc. cases, supra. This, the

Michigan Court failed or refused to do, and upheld the search and seizure purely on basis of diversified interpretations and applications of Michigan law, urging that it could do so under *Ker* v. *California*, supra. See 125 N.W. 2d at 878, 881, 892-3, 894.

Said Michigan Supreme Court's decision/opinion certainly does not hold, by any majority or controlling opinion, that in Michigan a search and seizure of an automobile may be made by police in conjunction or contemporaneously with stopping and issuance of a *Summons* for a Motor Vehicle Code or traffic rule violation. The majority of the Court merely ruled that *after* the officers stopped Winkle for a traffic violation, after short interrogation of driver *and* passenger, probable cause to believe that they had or were committing a felony suddenly developed.

This finding is not in accord with the facts of the case and does not comply with the requirements/rules/guides set forth by this Court in determining probable cause and/or reasonableness of arrest and search and seizure in the Federal Constitutional sense.

On basis of the arresting officers' undisputed testimony that the search and seizure herein were made as a matter of routine and departmental policy; no showing/testimony that the question as to whether or not Winkle's car was stolen was ever considered by them in course of their investigation and "arrest"; the verdict/ruling of the Trial Court that at the time the car trunk was opened the officers had no probable cause to believe that a felony had been or was being committed by Winkle, but that after the trunk was opened and a weapon and tools were discovered, the search and seizure became valid *Nunc Pro Tunc*, even though the bulk of the tools and weapon were not found

until a later search at the police post; the fact that Winkle was not placed under any arrest before the search commenced and was not then arrested for the felonies for which he was ultimately convicted; and the fact that the Attorney General conceded in his brief that the search and seizure herein would have been made under existing departmental policy regardless of the existence or non-existence of reasonable cause to do so—the search and seizure herein was unreasonable on basis of the following authorities:

Mapp v. *Ohio*, supra, which declared that, because the rights of the Fourth Amendment were of no lesser dignity than those of other liberties of the Bill of Rights absorbed in the Fourteenth, [Amendment],

> " . . . we can no longer permit [them] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend [Their] . . . enjoyment," (at page 660)

Ker v. *California*, 83 S. Ct. 1623, at page 1630, in expanding upon *Mapp*, informs us that:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria" laid down by the Fourth Amendment and in opinions of this court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here." (and cases cited)
>
> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful

arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where the 'facts and circumstances within their [the officer's] knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949), quoting from *Carroll* v. *United States*, 267 U.S. 132, 162 (1925) . . . "

"The question remains whether the officers action here exceeded the recognized bounds of an incidental search." (at page 1634)

In *United States* v. *Di Re*, 332 U.S. 581, 595, the Court said . . . "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from what is dug up subsequently." See also, *Elkins* v. *United States*, 364 U.S. 206; *Rios* v. *United States*, 364 U.S. 253; *Chapman* v. *United States*, 365 U.S. 610, *Johnson* v. *United States*, 333 U.S. 10; *Henry* v. *United States*, 361 U.S. 98.

Preston v. *United States*, 84 S. Ct. 881, expanding upon and augmenting the *Mapp* and *Ker* cases, supra, held that searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible. At page 883, citing: *Carroll* v. *United States*, *supra*, and *Brinegar* v. *United States*, 338 U.S. 160. See, *Agnello* v. *U.S.*, 269 U.S. 20.

The case also indicates at page 883, that since defendants were arrested for "vagrancy" and even if police had probable cause to think the car stolen or make a valid arrest —there may not be such things as articles which can be the

"fruits" or "implements" of the crime of vagrancy. Cf *United States* v. *Jeffers*, 342 U.S. 48, 51-52.

Since Winkle herein was allegedly arrested for turning against a red light and assuming, but without admitting, that he was "arrested" for said infraction at the scene, and assuming without admitting, that a contemporaneous search is allowed "to discover the fruits or implements of the crime for which he was arrested and or to discover weapons with which to effectuate escape"—what possibly can be the fruits or implements of a minor traffic rule violation? There are none, and any search thereon made would be without foundation or amount to no more than a "fishing expedition"—as in Winkle's case herein.

People v. *Carr*, 370 Mich. 251, is a case virtually in point with the *Preston* case supra, and held that an automobile may not be unreasonably searched. But the Michigan Supreme Court refused to apply the *Carr* case or *People* v. *Lee*, 371 Mich. 563, to appellant's case herein because it obviously felt that because of the *Quantum* and/or noxiousness of the articles seized Winkle should not escape convictions. But see *Stein* v. *New York*, 346 U.S. 156, 157.

Elliott v. *State*, 116 S.W. 2d 1009 (1938) involved stopping of a motorist for a very serious traffic law violation, yet the court refused to allow a search made of the trunk (at page 1010). See also *People* v. *Watkins*, 166 N.W. 433 and *People* v. *Schaub*, 279 Mich. 457; *People* v. *Mickelson*, 380 P. 2d 658.

Although the searching officers herein weakly claimed that they suspected that something was wrong, a "hunch", or mere suspicion, or even an "understandable suspicion", is not sufficient cause to justify a search without a warrant. *People* v. *Carr*, supra; *People ex rel Atty. Gen.* v. *Lansing*

Municipal Judge, 327 Mich. 410; *People* v. *Stein*, 265 Mich. 610; *People* v. *Bendoni*, 263 Mich. 295; *People* v. *Roache*, 237 Mich. 215; *People* v. *Stewart*, 232 Mich. 670; *People* v. *Burrington*, 221 Mich. 571.

The case of *People* vs. *Kuntze*, supra, used by some of the justices in the controlling opinion/s (1), to uphold the reasonableness of search, considerably differs from Winkle's case herein on basis of fact and law in establishing probable cause. It must be pointed out that in *Kuntze*, supra, the officers observed the suspects for a considerable time while they were engaged in a rather sustained curious and erratic driving pattern, saw blood on the occupants' shirts after stopping them for traffic violations and were able to see, from outside of the car, without a search, a leg of deer protruding from under the seat, possession of which was illegal per se and a misdemeanor. In this regard see also *People* vs. *Gonzalas*, supra, p. 248, Syllabus 7. Thus in *Kuntze* case, supra, unlike in *Winkle* herein, the suspects had violated traffic laws *plus* having committed a misdemeanor in the officers' presence—obvious and discoverable without a search. Further, the case of *People* vs. *Harper*, 365 Mich. 494, cited in *Kuntze*, supra, at 423, can also be distinguished from *Winkle*, in that the officers there had knowledge that defendant possessed marijuana in advance of stopping his auto and hence had probable cause to arrest and search. No such fact existed herein.

State police, who stop an automobile on a state highway to issue a traffic ticket, may not also routinely search the automobile. *People* v. *Gonzalas*, 356 Mich. 247, 250; *People* v. *Zeigler*, 358 Mich. 358, 361; *United States* v. *Lefkowitz*, 285 U.S. 452. If *Gonzalas* held that stopping of an automobile for a traffic violation was an "arrest", if only

temporary, *until* a traffic ticket was issued, such "arrest", without more, gave no right to make a search incidental to the "arrest." If, upon production of identification by petitioner and his questioning under the circumstances present, the officers had reason to believe that the car might have been stolen, as now urged by the Michigan Court, and even that the occupants were armed, ownership of the vehicle could be readily checked without unlocking the trunk, and it was unreasonable to anticipate any physical harm from a weapon under lock and key in the trunk of the automobile. See *People* v. *Miller*, 245 Mich. 115, 116. The extent of a search, even if founded on probable cause, must be reasonable.

A safe approach to the problem is to ask whether, prior to the search, the officers had knowledge of such facts as would amount to probable cause—a prerequisite to issuance of a search warrant under the Michigan Constitution. *People ex rel Atty. Gen.* v. *Lansing Municipal Judge*, supra. Would a magistrate issue a search warrant on the basis of the information that the police officers in this case could furnish, before they made the search? We think not.

Appellant has always maintained that the police officers herein engaged in a fishing expedition. *People* v. *Roache*, supra, *People* v. *Anders*, 333 P. 2d 854; *Johnson* v. *State*, 220 P. 2d 469; *People* v. *Kuntze*, supra. And see *Harris* v. *United States*, 331 U.S. 145, 175-181; *People* v. *Carr*, supra.

Ironically, in the *Opinion of Attorney General* (of Michigan), May 27, 19[illegible], No. 2872, and in *People* v. *Ziegler*, supra, page 361—it has been stated that:

"The issuance of a summons by a state police officer for alleged violation of the motor vehicle code does not constitute an arrest."

CONCLUSION

Appellant respectfully urges that his herein claimed and asserted Federal Constitutional rights were either denied him, not ruled upon, or were not given due recognition in substance and effect, by the Michigan Supreme Court, which put forward non-federal grounds of decision which were/are without any fair and substantial support in denying said rights and in upholding and affirming his convictions. *Ward* v. *Love County*, 253 U.S. 17, 22-23; *Bovie* v. *Columbia*, 12 L. Ed. 2d 894.

We respectfully submit that the questions are substantial and of general importance for jurisdiction on Appeal, and that this Honorable Court may find this case an appropriate one for reversal of appellant's convictions without further argument but to therewith determine the illegality, invalidity and unconstitutionality of the disputed Michigan Constitutional Provisos and of the search and seizure made herein.

That in the alternative, if the Court should so find and require, to treat this Jurisdictional Statement as a Petition for Issuance of Writ of Certiorari to the Michigan Supreme Court; Or in the further alternative, to issue its Writ of Mandamus directed to the Michigan Supreme Court compelling said Court to truly/actually decide all the Federal Constitutional issues raised herein in light of *Mapp* v. *Ohio*, *supra*, as originally ordered by this Court by mandate entered November 6, 1961.

With costs and attorney fees to appellant.

Respectfully submitted

WALTER A. KURZ
Attorney for Appellant
2408 Guardian Building
Detroit, Michigan 48226
962-2564

DENNIS BOYLE
Attorney for Appellant
1465 Penobscot Building
Detroit, Michigan 48226
962-3658

APPENDIX AA

(Taken From Joint Appendix)

EXCERPTS FROM TESTIMONY IN JUSTICE COURT EXAMINATION

(Filed September 9, 1957)

In Justice Court for Township of Madison, Lenawee County, Michigan

(Taken before Hon. Larraine Seaman, Justice of the Peace —on August 2, 1957)

• • •

"Q. Why didn't you proceed with your ticketing then? Isn't that what you intended?

A. First of all we searched them.

Q. Why?

A. Well, you can never tell what you find.

Q. Is that your procedure? To search people's cars when you ticket them?

A. Yes." (Golm-Cross, 9a)

• • •

EXCERPTS FROM TRANSCRIPT OF TESTIMONY GIVEN AT TRIAL IN CIRCUIT COUPT FOR COUNTY OF LENAWEE, MICHIGAN

(Filed October 17, 1958)

(Taken before Hon. Rex. B. Martin, Circuit Judge— on January 31, 1958)

• • •

At the trial of the cause, the same officer (Golm) apparently had become more sophisticated, but nevertheless testified as follows on examination:

"Q. Mr. Pandol came to the back of the car with the keys he had just obtained from the ignition, you had no reason (59) to believe then that a felony was being committed in your presence?

A. Well, at the time I thought that something was strange, because of the two different stories that they had given us. We suspected something.

Q. I am talking about felony. You had no reason to suspect a felony was being committed in your presence?

A. No, not actually, no.

Q. And you had no information that a felony had been committed by the defendant?

A. That's correct." (54a, 55a).

* * *

Subsequent to above and in relation to and concerning the same arrest, search and seizure situation herein, Trooper Golm's partner, Anthony Pandol, testified variously at the said trial of the cause as follows:

"Q. Now, did you ask anybody if you could take the keys out of the car?

A. No, sir.

Q. You took them yourself?

(76) A. Yes, sir." (Direct, 67a)

* * *

"Q. At any time between the time that you started to work that Saturday evening, and until you and your partner placed yourselves on M-52 opposite this Kitchen Restaurant were you instructed over this telephone system that you have in your car, about being on the lookout for any one special, or any car?

(83) A. Well, we have, during the tour of duty, we have numerous broadcasts coming over the radio. It is state wire. Any time a car is stolen anywhere in the state it

comes over the radio. It is very possible that we might have had maybe any number of calls.

Q. I mean do you know whether or not you had any instructions to be on the lookout for any special car, such as the one that these people were in?

A. As far as that goes, they are all special. They are stolen cars and after you take it, if it is anything, the same thing.

Q. What I am getting at is this: Had you instructions to be on the lookout for this particular car?

A. No, sir, not this car, not that I recall.

Q. All right, and if you had those instructions you would know about it, wouldn't you?

A. Probably so." (Cross, 72a)

• • •

"Q. All right. Now, up to that point you had not been advised by your superiors to be on the lookout for a car that had been involved in the commission of a felony?

(85) A. No, sir." (Cross, 73a)

• • •

"Q. Did any other violation occur about that time? . . .

A. Just before he made his left turn through the red light, three cars passed from north to south. The third car, I believe it was an Oldsmobile, made an improper over taking and passing. He passed on the yellow line.

Q. You mean a car that was in the rear of the caravan, so to speak, passed any of the cars in front of him?

A. Yes.

Q. (Continuing): Improperly?

A. Yes.

(86) Q. Well, as a matter of observation, in your opinion, just in your opinion, which was the greater violation of the two?

A. They were both serious violations. It just turned out the red light was easier to get to.

Q. So you chose the lesser of the two evils, so far as your efforts on your part was concerned?

A. That's correct.

Q. Normally now, yes. When you and your brother officer observed the person whom you subsequently found out was George Winkle make the left turn, that misdemeanor was finished, was it not? I mean, it had been accomplished. That was an accomplished fact?

A. Yes.

Q. I mean, it didn't need to do anything further to carry out the commission of that misdemeanor?

A. No, sir. I wouldn't say so.

Q. Whatever he was guilty of, in your opinion, that had already been accomplished?

A. That's correct.

Q. Now, you made your choice and you decided to go after Winkle instead of the other car?

A. Yes.

Q. And you pulled up behind Winkle?

A. Yes." (Cross, ~~74a, 75a~~)

• • •

"Q. Let me ask now again: In your opinion, what is it that you expected to find by a search of that automobile to establish that particular violation?

A. When you search a car you never know what you are going to find." (Cross, 76a)

• • •

"Q. (Continuing): What did you expect to find that would substantiate the fact that this misdemeanor had been committed by him?

A. Well, I wouldn't say we expected to find anything,

as far as the misdemeanor was concerned.

Q. All right. Fine. Is that your answer? I don't want to stop you, if you have got anything further to say.

A. As far as the red light was concerned, probably nothing.

Q. All you had to do at that point was to determine whether they were residents or non-residents and whether or not to issue a ticket or not issue a ticket, or not take them (90) in or take them in?

A. Yes.

Q. Nothing in and about that automobile that would help you to determine whether or not a crime was committed, or a misdemeanor committed?

A. No, sir.

Q. Yet nevertheless you went up there without permission of anyone, took the keys out of the dash board, went back and opened the trunk of the car. Isn't that true?

A. That's correct.

Q. You didn't, I am assuming you didn't, get any permission from either Mr. Winkle or the now deceased passenger?

A. No, sir, they were under arrest.

Q. Pardon?

A. They were under arrest.

Q. Had you apprised them of that?

A. No, I hadn't apprised them of it, as far as I was concerned, they were under arrest.

Q. Had you communicated that to them?

A. I hadn't directly told them they were under arrest, no.

Q. OK, that's your answer?

A. Yes.

Q. So without having apprised them of that fact, you

still proceeded to make a complete and thorough search of that automobile?

(91) A. That's right.

Q. Now, before this discovery that you made by reason of the search, nothing up to that point had created any suspicion on your part that these men were involved in the commission of a felony?

A. No, sir.

Q. It is only when you opened the trunk and saw its contents is when you made this discovery these men were in possession of contraband, as it were?

A. That's right.

Q. And it is then you placed them under arrest?

A. For the felony, yes." (Cross, 77a, 78a)

• • •

"Q. (Continuing): You and your brother officer pulled in behind Winkle's car. At that particular point you merely (92) are intending to talk to them, question them, apprise them of the fact they committed a violation is what your intentions were actually at that point?

A. Our intent was to issue a summons for disregarding the red light.

Q. Right.

Mr. Tucker (continuing): I think with that I will rest." (Cross, 79a)

• • •

"Q. Now, regarding this radio traffic and so on that's been indicated, let me ask you with respect to this case:

Was there any radio traffic that you had heard that night or any other night or at any other time that had anything to do with you making this initial stopping of this car, in your own mind?

A. No, sir.

Q. There was no connection between stopping that car and anything you had heard on the radio on that night or any other night prior to that. Is that correct?

A. No, sir.

Q. And of course, you have a lot of radio traffic. You can't remember all of that?

A. Yes.

Q. But whatever there might have been, that had no connection (94) with this stopping this car. Is that a correct statement?

A. That is correct." (Re-direct, 80a)

• • •

"Q. Before you opened the trunk you didn't ask him. You didn't finish your business about the traffic violation?

A. We weren't completely finished, I wouldn't say, no, sir.

Mr. Tucker: That's all." (Re-cross, 81a)

• • •

"Q. Incidentally, may I ask this, Officer Pandol: Do you (96) know of any law that requires you to make a search after you stop someone for a violation of a misdemeanor?

A. I know of no law that requires you to. I know that you are allowed to make a search after an arrest.

Q. I mean it is absolute. It isn't absolutely required?

A. It is not required in law, but more or less departmental policy.

Q. You don't know of any law that makes that a departmental policy?

A. No." (Re-Cross, 82a)

• • •

APPENDIX A

TRANSCRIPT OF JUDGMENT/VERDICT/OPINION OF CIRCUIT COURT JUDGE FOR COUNTY OF LENAWEE, MICHIGAN

(From Joint Appendix)

(Rendered by Hon. Rex B. Martin,
Circuit Judge on January 31, 1958)

"(101) Martin, J.—Gentlemen, let me say this: I don't think there is much use of this one man jury going back in chambers and deliberating.

The Court finds beyond a reasonable doubt that the essential elements needed to convict the defendant of each of the two counts has been proven, and the Court finds the defendant guilty as charged on each of the two counts in the information.

I do want the record to show some of the facts that I find from this testimony, although I don't believe there is too much dispute as to what the testimony does show.

The Court finds that the defendant illegally drove through a red light. That because of this misdemeanor the officers pulled in behind them and that the defendant stopped his car in the particular place he stopped it because the officers honked their horn at him, a well-recognized sign that they wanted the car in front of them to stop.

The defendant immediately stopped his car in that particular point and place at the request of the Trooper through the honking of the horn, got out of his (102) car and went back to see the Trooper and showed him his identification.

The Court finds as a matter of fact, that the Troopers were suspicious because of the difference between the

stories of these two men, and the identification.

But at the time they were talking to them, before the trunk lid was opened, they had no reasonable grounds to believe that a felony had been committed by either of these two men. They had no reasonable grounds to believe they were committing a felony in their presence.

I might say parenthetically here, my criminal law professor at the University of Michigan Law School, who was a grandson of a United States Supreme Court Justice, frequently argued in our classroom the fact that if a weapon was actually concealed in the car, a felony was being committed in the presence of the officer, whether he knew it or not.

Therefore, he was subject to lawful search. The search became lawful nunc pro tunc when they found a felony was being committed in their presence.

Apparently that's never been urged to the Supreme Court, and has never been ruled upon by the Supreme Court.

(103) I find further that the Trooper, without requesting permission to take the key and open the trunk and without voluntarily being given that permission, did take the keys to the car and opened the trunk.

I find that the contents of the trunk included tools and other items which are certainly burglary tools under the particular statute charged in count two. Found further a .38 caliber revolver, which is a concealed weapon as set forth in count one.

From the very nature of these tools, the very nature of all of the incidents, including the void identification and the void driver's license and the story told the officers by the defendant, the Court would find beyond a reasonable doubt that the defendant knew what these tools were adapted

and adapted for, what they were designed for.

That he had them in his car with the intent and purpose to use them and employ them as burglary tools.

I think the only dispute in this particular case is a question of law between the parties so to whether or not, when a car is stopped for a traffic misdemeanor, that a search of the car being made without any other basis for making the search except for the stopping and the arrest for traffic misdemeanor, were (104) such a search that the products of that search are admissible in evidence.

I think a legal arrest was made when these men were stopped, were questioned outside of the automobile and as a result of that arrest I think they had a legal right to make a search and I think the evidence is therefore admissible.

The defendant will be remanded to the custody of the Sheriff awaiting sentence.

Mr. Hammond: We will be notified at the proper time so that we may ask for our stay in connection with our proposed appeal?

The Court: Yes. Let's discuss that off the record.

(Court adjourned in this matter.)

PEOPLE *v.* WINKLE

358 MICH. REPORTS 551

[Jan. 1960]

Appeal from Lenawee; Martin (Rex B.), J. Submitted October 15, 1959. (Docket No. 83, Calendar No. 47,895.) Decided January 4, 1960.

George H. Winkle was convicted of carrying a concealed weapon and having possession of burglar tools. Affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina*, Solicitor General, and *Kenneth B. Glaser, Jr.*, Prosecuting Attorney, for the people.

Baker & Durst, for defendant.

VOELKER, J. Appellant Winkle was found guilty following his trial below under a single information containing 2 counts charging the crime of carrying a concealed weapon and the crime of possession of burglar tools. Trial was had before the circuit judge, a jury having been waived. The offending articles, all of which were admitted into evidence at the trial, were discovered and seized by 2 State police officers following a search made by them of a car driven by Winkle after he was stopped along the highway by the officers for a traffic violation which the officers had just observed and to which Winkle subsequently pleaded guilty. In the present case the defendant timely moved to suppress all the evidence obtained by the search, which motion was overruled, all the articles admitted, and the convictions resulted. Upon leave granted, the defendant has appealed here, urging 3 propositions: that he was never actually arrested by the officers; that in any event an arrest for the traffic offense (driving through a red light) did not warrant the search of the car and admission in evidence in the present case of the articles thus obtained; and, finally, that article 2, § 10, of the Michigan Constitution (1908), as amended in 1936 and again in 1952, offends against and is repugnant to the Constitution of the United States.

Article 2, § 10, of the Michigan Constitution (1908), as last amended, reads as follows:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation: *Provided, however, That the provisions of this section shall not be construed to bar from evidence in any court of crimi-*

nal jurisdiction, or in any criminal proceeding held before

any magistrate or justice of the peace, any narcotic drug or drugs, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or things, seized by any peace officer outside the curtilage of any dwelling house in this State." (Matter added by the amendments is italicized.)

The search of the car which is complained of here turned up a loaded .38 calibre revolver, a quantity of nitroglycerin, certain wood and metal cutting and burning implements, an electric drill, 2 pry bars, 1 pair of 10-inch wire cutters, 7 assorted chisels, 3 lock picks, an assortment of skeleton keys, 1 large sledge hammer, 2 gas masks, and a generous supply of detonator caps, besides numerous other professional adjuncts and acessories of the complete burglar. All of these articles were admitted in evidence over objection. It should be added that none of these articles could be seen by the officers when they stopped the Winkle car for the noted traffic offense nor had the officers any information or knowledge that any felony had been, was being, or was about to be committed. So far as it may be relevant to a decision in this case, the main reason for the officers making the search appears to have been the unsatisfactory and conflicting answers Winkle and a fellow passenger gave the officers in response to questions put by the officers to them about who they were, where they were from, and whither they were bound.

The revolver was described and set forth in the first count of the information, which charged the carrying of a concealed weapon; the nitroglycerin and detonator caps as

well as all the other articles above set forth (except the revolver) were described and included in the second count of the information, which count charged in the usual form

possession of burglar tools.

In *People* v. *Gonzales*, 356 Mich. 247, this Court recently unanimously held (except for Mr. Justice KAVANAGH, who did not sit) that the noted amendment to our Constitution did not offend the United States Constitution or any of its amendments. It will further be observed that the amendment to our State Constitution includes both the words "revolver" and "explosive" and the articles there enumerated. We also note that the "burglar tool" statute (CL 1948, § 750.116 [Stat Ann § 28.311]) specifically includes "nitroglycerine, or other explosive."

Since our decision in *Gonzales* it appears that once it has been determined that the search and seizure has occurred, in the words of the amendment, "outside the curtilage of any dwelling house in this State" and once it has further been determined that the articles seized and offered in evidence in a criminal proceeding are among those enumerated in that amendment (both of which are so here) then the circumstances of the arrest and of any search or seizure, or the frequently prickly question of whether or not the search and seizure was "unreasonable," appear to become totally irrelevant in any phase of the criminal case. As Mr. Justice SMITH tersely wrote in *Gonzales* (p. 264): "When we conclude that * * * [the amendment] is not repugnant to the Constitution of the United States, we have disposed of the case before us." The question is whether there are circumstances in this case, properly brought before us by the records and briefs, which take it

without the broad rule of *Gonzales*. We think there are none.

Before prosecutors and police go dance in the streets, a word or two of warning is in order. The question neverthe-

less still persists whether there are no possible situations in these or similar circumstances where the legality of the search might become relevant or even crucial. We think there may be and that this very case suggests if it does not present some of them. We have here a situation where on the face of it part of the results of the search appear admissible regardless of the validity of the search (the nitroglycerin and the detonator caps), since they are embraced both within the amendment and the "burglar tool" statute, and again in the same case a situation where the admissibility of another part of the results of the same search (the bulk of the "burglar tool" articles here seized) in turn depends upon the reasonableness of the search. The trial judge admitted all of them, evidently on the theory that the search was not unreasonable. If the search was good, then all the articles were admissible, and his decision was correct, amendment or no amendment. Had he been wrong, however, and especially had there also been a jury trial in this case, might not the defendant at least arguably have been prejudiced by the erroneous admission of so many articles of such a patent "burglar toolish" character, along with the 1 or 2 articles that were by virtue of the amendment admissible regardless of the illegality of the search, especially if it should happen that the latter 1 or 2 articles if admitted and considered alone might at least arguably be susceptible of innocent workaday uses? And

aside from the rights of a defendant, might not the people thus gratuitously be injecting in a given case a matter of proof (legality of the search) that they otherwise need not have raised had they instead confined their charge and offer in evidence only to those articles clearly embraced in the amendment? And should not a careful and fair prosecutor also consider the propriety and possible danger in these

circumstances of joining in a single information, as was done here, 2 separate offenses which anticipate the ultimate introduction into evidence of seized articles, as to part of which the amendment clearly applies (such as the lone revolver in the concealed weapon count) and, as to the "burglar tool" charge in the other count, part of the seized articles are embraced within the amendment and part are not? Might not the people thus possibly find themselves in a situation of nevertheless having to maintain the validity of the search, even though some (or even most) of the seized articles were clearly within the scope of the amendment? These are some of the possible prickly questions suggested by the general situation in this case.

Despite the foregoing, we are not going to get into the question of the reasonableness of the search in this case. None of these questions was raised or argued or hinted at here or below. Even assuming arguendo that the search here might have been bad, certainly some of these articles would have nevertheless been admissible under the amendment, regardless of that fact. At the very most, perhaps, the trial might have been delayed. In the particular circumstances of this case, and considering the nature of the articles that would clearly have been admissible under the amendment it offered alone, we are not going to assume that

the circuit judge, sitting without a jury, was unduly swayed, or that the defendant was unduly prejudiced by the possible erroneous admission (which we do not pass on) of certain additional articles along with other articles that were admissible regardless of the possible illegality of the search. We raise the above questions more for the future than for their applicability to this case. We do not undertake finally to answer them. We assume that a word to the wise is sufficient, and that those most concerned will duly ponder the

implications of the foregoing remarks.

There remains 1 final observation. We note that the 2 State police officers who made the search and testified below, candidly admitted at the trial that searches of the kind made here, at the hour this one was made (around 2 a.m.), are "routine" with their department, once a car is legally stopped for a minor traffic offense. This is the second time in a few months that questioned searches of this kind have come before us. *Gonzales* was the other. We do not understand that either the noted amendment or our decision in *Gonzales* authorizes the police to become motorized inquisitors or to make indiscriminate searches of persons or cars following their legally being stopped for minor traffic offenses. If this is indeed the settled policy of the State police or others, we suggest that it forthwith be reviewed and that the practice cease.

The convictions below are affirmed.

KELLY, SMITH, and BLACK, JJ., concurred with VOELKER, J.

EDWARDS, J. *(concurring in result)*. I concur with Justice VOELKER's result. It is obvious that at the time of the search

of the automobile in this case, and at the trial of this case, the police officers were relying upon *People* v. *Davis*, 247 Mich 536, as authorizing search of the automobile contemporaneous with any traffic arrest. As a result, little effort was made in court to offer justification for the search in terms of probable cause to believe a felony was being committed.

In *People* v. *Gonzales*, 356 Mich 247, 256, we have recently overruled *People* v. *Davis*. But as Mr. Justice VOELKER points out, *Gonzales* also stands as authority for ad-

mission in evidence (under the 1936 and 1952 amendments to article 2, § 10, Mich. Const [1908]) of the revolver, the dynamite, and the dynamite caps which were found in the trunk of defendant's car. With these items in evidence and without the other exhibits, this record offers ample evidence to sustain the convictions. I agree that there was no prejudicial error.

DETHMERS, C. J., and CARR, and KAVANAGH, JJ., concurred with EDWARDS, J.

STATE OF MICHIGAN

IN THE SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 26th day of April, A.D. 1961.

In the Matter of GEORGE H. WINKLE, Cause No. 49295½

PRESENT: The Honorable JOHN R. DETHMERS, Chief Justice, LELAND W. CARR, HARRY F. KELLY, TALBOT SMITH, EUGENE F. BLACK, GEORGE EDWARDS, THOMAS M. KAVANAGH, THEODORE SOURIS, Associate Justices.

In this matter a Petition is filed for the allowance of a Writ of Habeas Corpus, and for any ancillary Writ of Certiorari, and an Answer thereto having been filed by the Prosecuting Attorney, and due consideration thereof having been had by the Court, it is Ordered that the Petition be and the same is hereby DENIED.

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

I, DONALD F. WINTERS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true copy of an Order entered in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said Original Order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the said Supreme Court at

Lansing, this 3rd day of May, A.D. 1961.

/s/ DONALD F. WINTERS,
Clerk.

SUPREME COURT OF THE UNITED STATES

WINKLE *v.* BANNAN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 93, Misc. Decided November 6, 1961.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and, as suggested by the Attorney General of Michigan, the case is remanded for consideration in light of *Mapp* v. *Ohio*, 367 U.S. 643.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 11th day of December in the year of our Lord one thousand nine hundred and sixty-four.

Present the Honorable THOMAS M. KAVANAGH, Chief Justice, JOHN R. DETHMERS, HARRY F. KELLY, EUGENE F. BLACK, THEODORE SOURIS, OTIS M. SMITH, MICHAEL D. O'HARA, PAUL L. ADAMS, Associate Justices.

In re Petition of 49295½ George H. Winkle.

Upon receiving and filing the mandate of the Supreme Court of the United States in this cause, it is ordered that the Order heretofore entered herein on April 26, 1961 denying habeas corpus and certiorari to the Circuit Court of the County of Lenawee be and the same is hereby vacated and held for naught and that the cause be rebriefed and submitted to this Court for reconsideration in the light of *Mapp* v. *Ohio*, 367 U.S. 643.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of December in the year of our Lord one thousand nine hundred and sixty-one.

DONALD F. WINTERS,
Clerk.

372 Mich. 292

PEOPLE of the State of Michigan, ex rel. George H. WINKLE, Petitioner

v.

William H. BANNAN, Warden of the State Prison, Southern Michigan, Jackson Michigan, Respondent.

No. 58

Supreme Court of Michigan.

Feb. 3, 1964.

Original proceeding in habeas corpus by state prisoner. The Supreme Court held that state traffic officers who stopped defendant at 2:00 A.M. on Sunday after having observed defendant violate a traffic signal and who thereafter determined that automobile driven by defendant was not registered in the name of either occupant, that defendant had an out of state driver's license, and that the occupants had radically conflicting stories had probable cause for arrest of defendant without a warrant and therefore search of the automobile and the seizure of a revolver and burglar tools found therein, although made without a warrant, was not unreasonable nor unlawful.

Order of dismissal affirmed.

1. Criminal Law—394.4(12)

Evidence obtained by officers in a search of an automobile without a warrant, in order to be admissible, had to be the product of a search incident to a lawful arrest.

2. Arrest—63(4)

To show probable cause for making an arrest without a warrant, it is not necessary that the arresting officer should

have had before him legal evidence of a suspected illegal act, but it is enough that the apparent facts which have come to his attention are sufficient in the circumstances to lead a reasonably discreet and prudent man to believe that an offense has been or is being committed.

3. Automobiles—349

A motorist stopped by a traffic officer for a traffic offense would be considered "arrested" for purposes of justifying a search without a warrant pursuant to a lawful arrest, even if the motorist was not specifically informed that he had been arrested. Comp.Laws 1948, § 764.15.

See publication Words and Phrases for other judicial constructions and definitions.

4. Automobiles—349
Searches and Seizures—7(12)

State traffic officers who stopped defendant at 2:00 A.M. on Sunday after having observed defendant violate a traffic signal and who thereafter determined that the automobile driven by defendant was not registered in the name of either occupant, that defendant had an out of state driver's license, and that the occupants had radically conflicting stories had probable cause for arrest of defendant without

a warrant, and therefore search of the automobile and the seizure of a revolver and burglar tools found therein, although made without a warrant, was not unreasonable nor unlawful.

5. Constitutional Law—46(1)

Constitutionality, under the Fourteenth Amendment of the federal Constitution, of search and seizure exemption provision of the state Constitution would not be passed upon where not essential to decision of habeas corpus peti-

tion brought by state prisoner. U.S.C.A.Const. Amend. 14; Const. Art 2, § 10.

Walter A. Kurz, Detroit, for petitioner.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Donald T. Kane, Asst. Atty. Gen., for respondent.

Leo A. Farhat, Chairman, Committee on Criminal Jurisprudence, Samuel J. Torina, Thaddeus F. Hamera, Lansing, for State Bar of Michigan Committee on Criminal Jurisprudence, amici curiae.

T. Harrison Stanton, Jackson, Gilbert M. Frimet, Detroit, Nedwin L. Smokler, Chairman Sub-Committee of Civil Liberties Committee of State Bar of Michigan, Ferndale, for Civil Liberties Committee of State Bar of Michigan, amici curiae.

Before the Entire Bench.

KELLY, Justice.

Petitioner, George H. Winkle, was convicted by the Lenawee county circuit court on January 31, 1958, for carrying a concealed weapon and having possession of burglar tools. Winkle waived jury trial and moved to suppress the seized evidence, claiming an illegal search and seizure. Winkle's motion to suppress was denied and he was convicted of both counts and sentenced to 4 to 5 years on the concealed weapon count and to 5 to 10 years on the possession of burglar tools count. The conviction and sentences were affirmed on January 4, 1960, by this Court in People v. Winkle, 358 Mich. 551, 100 N.W.2d 309.

Thereafter Winkle filed for habeas corpus and certiorari in this Court, and the petition was denied. A petition for certiorari was filed in the United States supreme court on May 12, 1961, seeking review of this Court's order denying habeas corpus. The United States supreme court granted

Winkle's motion for leave to proceed in forma pauperis and granted certiorari November 6, 1961. On June 19, 1961, the United States supreme court decided the case of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081, and the Attorney General of Michigan thereafter filed a response and suggested the cause be remanded to this Court for decision in the light of the Mapp Case.

Since appeal petitioner Winkle has been free on bond.

Upon receipt of the mandate from the United States supreme court, this Court on December 11, 1961, vacated our earlier denial of habeas corpus and certiorari and ordered the cause to be rebriefed and submitted to us for reconsideration. Subsequent to oral argument, this Court further requested briefs by the committees on criminal jurisprudence and civil liberties of the State Bar of Michigan, as parties amici curiae.

The following facts are undisputed by both petitioner and respondent, and are accordingly adopted:

"On July 21, 1957, at approximately 2:00 a.m., petitioner George H. Winkle (hereinafter called Winkle), accompanied by Lee Casteel, was traveling west on US-223, south of the city of Adrian, Michigan. As they approached the intersection of US-223 and M-52, the traffic light regulating the intersection turned amber. Winkle came to a stop on the corner of US-223 and M-52. Winkle waited for the traffic to clear on M-52, the north and south roadway, and then before the traffic light turned green, made a left hand turn on to

M-52 and proceeded south for approximately 100 feet and made another left hand turn into the driveway of the Rock Inn Motel.

"Winkle had a few minutes prior, caused a telephone call to be made to the Rock Inn Motel to determine the availability of accommodations on the particular night. As the Winkle car proceeded up the drive of the Rock Inn Motel they were approached from behind by a Michigan State Police patrol car carrying two Michigan State Troopers. The officers honked their horn twice as they approached the Winkle car and the Winkle car came to a stop, in the driveway, 20 feet east of the office of the Rock Inn Motel. Mr. Winkle got out of his car and proceeded to walk towards the Michigan State Police car. The driver of the State Police car, Trooper Robert Golm, walked towards the Winkle car and met Winkle somewhere in the vicinity of the rear bumper of the Winkle car.

"Trooper Golm requested Winkle's driver's license, and informed Winkle that they were stopping his car for disobeying the red light. Winkle displayed to Trooper Golm a driver's license bearing the name of George Henry Winkle. He also displayed a certificate of registration for the automobile which he was driving, in the name of Henry Williams. Winkle explained the car was his brother-in-law's. Therefore the name on the registration was different than on his driving license. Trooper Golm also requested information from Winkle as to his destination. While this conversation was occurring between Trooper Golm and Winkle, the other Trooper Anthony Pandol, was talking to Lee Casteel, the other occupant of the car. The Troopers then switched, Trooper Golm going over to talk to Casteel and Trooper Pandol going over to talk to Winkle.

"Shortly after this, Trooper Golm returned and talked with Winkle and had by this time been given conflicting statements as to destination, purposes, etc."

At this juncture, petitioner contends, Trooper Pandol

walked up to the Winkle car, without making an arrest, without knowledge of the conflicting statements made to Trooper Golm, and proceeded to make a search of the trunk of the vehicle. Respondent, however, asserts that information as to conflicting stories had either been exchanged by the troopers prior to opening the trunk or that both officers had obtained the conflicting stories separately and discussed the case prior to search. In this regard respondent refers to Trooper Golm's testimony as to knowledge he and Pandol had at the moment prior to search: "Well, at the time I thought that something was strange, because of the two conflicting stories that they had given us."

The record establishes that Winkle said he was going on a 2 or 3 weeks fishing vacation around Detroit and Pontiac. He said that the name of his partner was "Philbrick"; that he (Winkle) lived in a motel around Indianapolis, Indiana, and his partner lived in an apartment on Central street.

Casteel (Philbrick) told the trooper he was going to Toledo to see some girls; that he had to be back in Indianapolis on Monday, and that he and Winkle lived together in an apartment on Central street.

A search of the trunk yielded numerous burglar tools.[1] Winkle and his partner were then handcuffed and placed in the police car. A detailed search of the vehicle also disclosed a concealed 38-caliber revolver.

When this case was first before us on leave to appeal in

---

[1] "A 'Milwaukee' one H.P. drill, 50 feet of extension cord, 6 feet of chain, 8 assorted carbide tipped drills from $\frac{3}{4}$ to $\frac{3}{8}$, 2 pry bars, 3 large screw-drivers, 10-inch wire cutters, 7 assorted chisels, 7 drift pins, 2 punches, 1 center punch, 1 pair vise grip pliers, 2 Chayes Porcel point grinders, 3 lock picks and assorted skeleton keys, one 8-pound sledge hammer, two 2-cell flashlights, 2 gas masks, 1 pair leather boots, 1 pair canvas top shoes, 1 pair coveralls, nitroglycerine, nitroglycerine jelly, detonator caps, flashlight battery."

358 Mich. 551, 100 N.W. 2d 309, our decision affirming the trial court rested solely on the validity of our Constitutional

878 Mich.

amendment, Art. 2, § 10, and no determination was made as to the reasonableness of the search.

Three questions will be answered in this opinion, namely:

1.—Was the search and seizure an unreasonable and unlawful search?

2.—Is Mapp v. Ohio, supra, applicable retrospectively?

3.—Is the search and seizure exemption provision contained in Art. 2, § 10, of the Michigan Constitution, as amended, unconstitutional and void and repugnant to and in conflict with the United States Constitution by reason of Mapp v. Ohio, thus requiring this Court to overrule its January 4, 1960, decision in People v. Winkle, 358 Mich. 551, 100 N.W.2d 309?

1.—WAS THE SEARCH AND SEIZURE AN UNREASONABLE AND UNLAWFUL SEARCH?

June 10, 1963, Mr. Justice Clark delivered the opinion of the United States supreme court in the case of Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726. This case referred to the standard by which State searches and seizures must be evaluated, stating:

"This case raises search and seizure questions under the rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). * * * This being the first case arriving here since our opinion in Mapp which would afford suitable opportunity for further explication of that holding in the light of intervening experience, we granted certiorari."

Justice Clark stated (374 U.S. pp. 31, 32, 83 S.Ct. p. 1628, 10 L.Ed.2d 726):

"Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in Mapp. First, it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not be restricted * * * to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts * * * this Court has * * * formulated rules of evidence to be applied in federal criminal prosecutions.' McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1943); cf. Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937). Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401, 83 S.Ct. 385, 390, 9 L.Ed.2d 390 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. Mapp sounded no death knell for our federalism; rather, it echoed the sentiment of Elkins v. United States, supra, 364 U.S. [206], at 221, 80 S.Ct. [1437], at 1446, 4 L.Ed.2d 1669, that 'a healthy federalism depends upon the avoidance of needless conflicts between state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches.' 367 U.S. at 658, 81 S.Ct., at 1693, 6 L.Ed.2d 1081. (Emphasis added.) Second, Mapp did not attempt the impossible

task of laying down a 'fixed formula' for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be 'met with "recurring questions of the reasonableness of searches,"' and that, 'at any rate, "[r]easonableness is in the first instance for the [trial court] to determine."' "

[1] Justice Clark then added (374 U.S. pp. 34, 35, 83 S.Ct. p. 1630, 10 L.Ed.2d 726)[2]:

"The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' "

[2] The test that the officer does not have to have legal evidence, but only sufficient facts for a reasonably discreet and prudent man, was previously enunciated in Husty v. United States, 282 U.S. 694, 51 S. Ct. 240, 75 L.Ed. 629, where the court held:

"To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. * * It is enough if the apparent facts which have come to his attention are

[2] The official reports, 374 U.S. pages 24, 44 and 46, recognize the opinions in the Ker Case are divisive. Lawyer's Edition entitles this portion as a "separate opinion." See 10 L.Ed.2d 739.

sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched." (Syllabus 2.)

[3] Petitioner concedes that in the instant case a police officer is given authority to arrest for traffic infractions (C.L.1948, § 764.15 [Stat.Ann. § 28.874]), but contends "that no arrest having occurred, the search was unlawfully and any item seized thereby should have been excluded." (Brief in Oct. No. 83, 1959).

Petitioner points out that some act designed to inform the individual of his arrest must occur. The People's brief in the earlier case conceded this to be correct, and quotes 2 M.L.P., Arrest, § 6, p. 489, as follows:

> "Although a manual seizure is not necessary, there must be some sort of personal coercion to effectuate an arrest; there is no arrest where an officer, neither taking into custody the person to be arrested nor in any way depriving him of freedom of action, merely informs him of the officer's business,"

and emphasizes the following from Hill v. Taylor, 50 Mich. 549, 552, 15 N.W. 899, 900:

> "The officer appears to have done no more than inform him of his business, but he never took him into custody, and never, as plaintiff testifies, deprived him of freedom of action."

The People contend that not only was the petitioner deprived of freedom of action that constituted an arrest, but that Winkle was well aware of that fact, because, as stated in the People's original brief, "with two uniformed officers pulling up behind one in these circumstances with an insistent honking of a horn has only one meaning to a motorist and he realizes that stopping his vehicle is a necessity

not a matter of his will any longer. That Winkle well understood this as clearly indicated by his actions in stopping immediately right in the middle of the drive although there were parking places even leaving his lights burning coming back immediately to meet the officers and not going in the direction of the motel office in the words of Trooper Golm —'told him that we stopped him for disobeying the red light' was 'asked' to produce his operators license and registration and was questioned at some length by two troopers. A familiar scene to anyone who drives a motor vehicle. The classic encounter with the traffic cop. It is pos-

sible that appellant at any time from the moment he was stopped by the honking of the horn and the authority of the vehicle marking and occupants and at any rate from the moment he was advised of the reason for the action, could misinterpret his status as being under the control of the officer as an arrested person, temporarily perhaps, but none the less arrested. Is it conceivable that after being advised of the violation for which he was stopped Mr. Winkle could believe that, if he should be so inclined, he could tell the officer he was moving on, climb back into his vehicle and leave without permission from the officer?"

I disagree with petitioner's statement that "what was said in People v. Gonzales (356 Mich. 247) [97 N.W.2d 16] is particularly applicable to and is determinative of petitioner's fact situation and issues raised thereby as contained in the record."

The first paragraph of Judge Edwards' opinion in Gonzales is as follows (356 Mich. p. 250, 97 N.W.2d p. 18):

"This case poses 2 important questions. The first is:

May police who stop an automobile on a Michigan highway to issue a traffic ticket also routinely search the automobile under Michigan law? We answer this question in the negative. The second is: Are certain amendments to the Michigan Constitution authorizing admission into evidence of concealed weapons, however seized outside the curtilage of a dwelling house, repugnant to the United States Constitution? Under controlling decisions of the United States supreme court, we answer this question in the negative also."

Gonzales was a passenger in an automobile that was stopped by State police because the car in which he was riding had only one headlight burning. No other fact was offered by the people to justify the subsequent search that resulted in the finding of a gun in the car and a bullet in Gonzales' possession. In Gonzales, this Court not only held that a traffic violation did not justify a *routine* search of the automobile stopped, but, also, held that an arrest consists of any act subjecting the person to the actual control and will of the person making the arrest and that police officers who see a traffic violation have authority to arrest the violator without a warrant.

The officers clearly indicated their intent, by their acts, to place petitioner under their actual control, and we agree with the People that:

"*The issuance of the summons is not involved in the question at all.* Nearly all arrests (except for offenses in which life imprisonment is a possible result) end sooner or later. In the case of the criminal it ends with his release from jail or prison when he is again free to determine his own course of action; in the case of the violating motorist, his arrest, probably brief in duration, ends with the presentation of the summons when he too is free to

determine his own course of action without interference from the officer. IT IS DIFFICULT TO SEE HOW, WHERE ONE IS IN FACT DEPRIVED OF HIS LIBERTY BY THE OFFICER, AND KNOWS IT, WHETHER SO INFORMED BY WORD OR DEED OR BOTH, THE FACT CAN BE CHANGED BY THE DURATION OF THE DEPRIVATION, OR THE MEANS OR PLACE OF ITS TERMINATION." (Attorney General's Brief, Oct. No. 83, 1959.)

The following facts and circumstances were well known to the arresting officers: (1) it was 2:00 a.m. Sunday; (2) The automobile was legally stopped; (3) The car was not registered in the name of either occupant; (4) There was an open bottle of vodka on the front seat of the automobile; (5) The men were from Indiana and the driver displayed a Florida driver's license; (6) The occupants told the troopers completely and radically conflicting stories as to their places of residence, their destination, the purpose

of their trip, and the length of their intended stay.

[4] The facts and conflicting statements of petitioner and his associate were completely inconsistent and irreconcilable with those of innocent travelers on the highway.

These facts would not only justify a law enforcing officer who was reasonably discreet and prudent to conduct the search that uncovered the nitroglycerine, detonater caps, and a complete set of burglar tools, plus a concealed weapon, but were of such a nature that any failure to conduct the investigation, such as the troopers conducted in this case, would have constituted action that would justify reprimand for failure to carry out their duty.

The record in this case clearly shows that the search and seizure was not unreasonable nor unlawful.

2. IS MAPP v. OHIO, SUPRA, APPLICABLE RETROSPECTIVELY?

The district court in Maryland was faced with this question in the case of Hall v. Warden, Maryland Penitentiary, D.C., 201 F.Supp. 639, p. 643, decided January 23, 1962, and the court said:

"Until the Supreme Court itself clarifies the point, it is impossible for any other court or judge to be certain whether and to what extent the Supreme Court intended the decision in Mapp v. Ohio to be retrospective. A majority of the Court of Appeals of New York has concluded that the exclusionary rule stated herein should be applied in a case where the judgment of conviction had not yet become final, because of a pending appeal, at the time Mapp v. Ohio was decided, People v. Loria (Nov. 30, 1961), 10 N.Y.2d 368, 223 N.Y.S.2d 462, 179 N.E.2d 478. See also Shorey v. State (January 23, 1962), [227 Md. 385], 177 A.2d 245. But it has not yet been held in any case cited or found that all persons convicted in state courts during the period between Wolf v. Colorado [338 U.S. 25 (69 S. Ct. 1359, 93 L.Ed. 1782)] and Mapp v. Ohio are entitled to a new trial or release if any evidence, obtained as the result of an unreasonable search and seizure was admitted at their trial, even though the judgment of conviction may have become final long before Mapp was decided and whether or not the point was raised at the trial.

"In view of the frequent use in Mr. Justice Clark's opinion of such words as 'then', 'today', and 'no longer', and the reasons given for the Supreme Court's previous refusal to impose the Weeks [Weeks v. United States,

232 U.S. 383 (34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834, Ann.Cas.1915C 1177)] exclusionary rule on the states, such an extreme construction appears unwarranted. I conclude that Mapp v. Ohio was not intended to require that a new trial or release must be granted to a person convicted in a state court because evidence obtained as the result of an unlawful search was admitted in evidence at the trial, where the point was not raised at the trial and the judgment had become final before the decision of the Supreme Court in the Mapp case. See Gaitan v. United States, 10 Cir., 295 F.2d 277, 279-280. In the case at bar the point was not raised at the trial or on appeal from the conviction, and the judgment had become final before Mapp v. Ohio. So, even if the evidence had been illegally seized, its admission would not have deprived petitioner of his constitutional rights."

Neither Mapp v. Ohio nor Ker v. California, supra, gives us an answer to this question and until such an answer is forthcoming, this Court will follow the Maryland and Colorado Federal and New York state courts' reasoning above set forth, and hold that Mapp v. Ohio is not applicable retrospectively except in a case like the present one where the judgment had not become final at the time of Mapp v. Ohio because an appeal from the judgment was pending.

3.—IS THE SEARCH AND SEIZURE EXEMPTION PROVISION CONTAINED IN ART. 2, § 10, OF THE MICHIGAN CONSTITUTION, AS AMENDED, UNCONSTITUTIONAL, VOID AND REPUGNANT TO AND IN CONFLICT WITH

THE UNITED STATES CONSTITUTION BY REASON OF MAPP v. OHIO, THUS REQUIRING THIS COURT TO OVERRULE ITS JANUARY 4, 1960, DECISION IN PEOPLE v. WINKLE, 358 MICH. 551, 100 N.W.2d 309?

This Court has repeatedly held that constitutional questions will not be passed upon where other questions are raised which dispose of the case.

This case, due to its procedural history, is not disposed of by our holding in Point 1, as is disclosed by the following quotations from the brief filed by the respondent (Attorney General) and the brief filed by the State Bar of Michigan's Committee on Criminal Jurisprudence.

Quoting from the brief for respondent:

"Subsequent to (trial court) decision a petition for habeas corpus was filed in the Supreme Court of Michigan and denied on April 26, 1961. On May 12, 1961, a petition for certiorari was filed in the office of the clerk of the United States Supreme Court seeking review of the order denying habeas corpus.

"The Supreme Court of the United States decided the case of Mapp v. Ohio, 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081] on June 19, 1961.

"The Attorney General of Michigan filed his response and the Supreme Court entered an order as follows:

"'The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and, as suggested by the Attorney General of Michigan, the case is remanded for consideration in light of Mapp v. Ohio, 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081].'

"Upon receipt of the mandate from the Supreme Court of the United States, the Supreme Court of Michigan on

the 11th day of December, 1961 entered an order as follows:

"'Upon receiving and filing the mandate of the Supreme Court of the United States in this cause, it is ordered that the order heretofore entered herein on April 26, 1961 denying habeas corpus and certiorari to the Circuit Court for the County of Lenawee be and the same is hereby vacated and held for naught and that the cause be rebriefed and resubmitted to this Court for reconsideration in the light of Mapp v. Ohio, 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081].'"

From the brief of the Committee on Criminal Jurisprudence, State Bar of Michigan, we quote:

"This Court has invited the State Bar of Michigan to submit briefs amicus curiae on the application of Mapp v. Ohio to the issues of People v. Winkle. The State Bar's Committee on Criminal Jurisprudence does so herein, limiting itself to these two related questions:

"1. Does Mapp v. Ohio cause Article II, Sec. 10, of the Michigan Constitution of 1908, as amended to date, to be in violation of the Constitution of the United States?

"2. Does Mapp v. Ohio require this Court to overrule its own January 4, 1960, decision in People v. Winkle, 358 Mich. 551 [100 N.W.2d 309]?

"We submit that BOTH questions require a NEGATIVE answer. Because we feel this case requires a clear-cut decision on the federal constitutionality of existing

Michigan law, we intentionally avoid presenting any other basis for upholding People v. Winkle, 358 Mich. 551 [100

N.W.2d 309]. We hope that no other such basis will be employed by the Court."

In making an exception to our otherwise continuing policy of avoiding unnecessary constitutional decisions, we are also aware of the fact that in the interests of effective law enforcement, law enforcing officials and the courts of this State must be clearly advised of what is and what is not permissible search and seizure. We are also aware that our avoiding the constitutional question could lead to the implication that: (1) our prior decision rested on art. 2, § 10, of the Michigan Constitution; (2) the United States supreme court, Winkle v. Bannan, at 368 U.S. 34, 82 S.Ct. 146, 7 L.Ed.2d 91 (remand order) vacated such prior judgment; (3) the United States supreme court in its order of remand to this Court for further consideration cited Mapp v. Ohio, supra, as our guide in such reconsideration (4) this Court now decides the case on a ground other than the constitutional question; (5) therefore, this Court has implied that Mapp v. Ohio has affected our view of the constitutionality of art. 2, § 10, of the Michigan Constitution.

For the above reasons we believe the constitutional question must be considered.

Michigan has been a leading State in its effort to safeguard its citizens against illegal search and seizure.

We find Michigan's illustrious jurist, Cooley, in 1874 (Weimer v. Bunbury, 30 Mich. 201, 208) making the following comment upon the then section 26 of article 6 of the Constitution (1850): "Its main purpose was to make sacred the privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it."

The provisions of our recent 1908 Constitution relating to search and seizure (art. 2, § 10) were commented upon

in 1919 in People v. Marxhausen, 204 Mich. 559, 562, 171 N.W. 557, 3 A.L.R. 1505, as follows:

"Section 10, art 2, of the Constitution of the state, provides:

" 'The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.'

"This provision is the same as found in the Constitution of 1850 (art 6, § 26), and with the exception of the use of the word 'person,' in place of the word 'individual,' the same as found in the Constitution of 1835. It is in effect the same provision found in the Fourth Amendment to the federal Constitution."

In the Marxhausen Case this Court reviewed the background of facts that led up to the adoption of the Fourth Amendment to the Federal Constitution and called attention to the arbitrary, unlawful conduct of 204 Mich. p. 564, 171 N.W. p. 558, 3 A.L.R. 1505) "a practice [that] had grown up in England of issuing so-called writs of assistance, originally by the Star Chamber, and later by the Secretary of State, under color of which messengers of the king entered any and all places agreeable to themselves, searched, and seized such papers and evidences as their will dictated," and referred to the 1766 resolution in the House of Commons condemning these illegal searches and seizures, quoting Chatham as follows (204 Mich. p. 565, 171 N.W. p. 558, 3 A.L.R. 1505):

" 'Every man's house is called his castle. Why? Because it is surrounded by a moat, or defendant by a wall? No. It may be a straw-built hut; the wind may whistle around it, the rain may enter it, but the king cannot,"

and finally concluded the historical review of events leading up to the adoption of the Fourth Amendment by stating (204 Mich. p. 566, 171 N.W. p. 559, 3 A.L.R. 1505): "These events, which we have but given in outline, occurred within the memory of the men who formulated and adopted the Fourth Amendment."

From the earliest days to the present time, a Michigan citizen has not only been "king of his castle," but all he possessed "within the curtilage."

In People v. Taylor, 2 Mich. 250 (1851), this Court defined "curtilage" as a "courtyard, back-side, or piece of ground lying near and belonging to a dwelling-house," and as "a space of ground within a common enclosure, belonging to a dwelling-house."

In 1850, this Court in Pond v. People, 8 Mich. 150, held that a building 36 feet distant from a man's house, used for preserving the nets employed in the owner's occupation as a fisherman, is, in law, a part of his dwelling although not included with the house by a fence. The Court held that a fence is not necessary to include buildings within the curtilage, if, within a space no larger than that usually occupied for the dwelling and customary out-buildings.

In 1914, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, created the Federal "exclusionary rule," holding that the Fourth Amendment barred the use of evidence secured by illegal search and seizure in a Federal prosecution, but also holding that Weeks had no bearing upon admissibility of evidence in State courts.

In 1949, Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, held that the right to privacy under the Fourth

Amendment was enforceable against the States through the due process clause of the Fourteenth Amendment, but held that the Weeks exclusionary rule did not apply to the States as an essential part of the Fourteenth Amendment's due process.

In Elkins v. United States, 364 U.S. 224, 80 S.Ct. 1447, 4 L.Ed.2d 1669, the court set forth a table of States and their rules on admissibility of evidence[3], disclosing that between the Weeks decision (1914) and the Wolf decision (1949) 18 States had excluded evidence of illegal search, and Michigan, in 1919 (People v. Marxhausen, supra), was the first State to so exclude.

In 1905 this Court took judicial notice of the problem of law enforcement that was created by the arrival of the automobile in an appeal (People v. Schneider, 139 Mich. 673, p. 675, 103 N.W. 172, p. 173, 69 L.R.A. 345) involving the right of the city of Detroit to register automobiles, by stating: "We may take judicial notice that many of *these automobiles may be driven at a speed of at least 40 miles an hour.*" (Emphasis ours.)

In 1922, Justice Steere writing for a majority of this Court, in People v. Case, 220 Mich. 379, pp. 388, 389, 190 N.W. 289, p. 292, 27 A.L.R. 686, recognized the problem:

> "The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in bat-

---

[3] MICHIGAN – 1919
Kentucky – 1920
Florida – 1922
Mississippi – 1922
Oregon – 1922
Tennessee – 1922
Washington – 1922
West Virginia – 1922
Indiana – 1923
Oklahoma – 1923
Wisconsin – 1923
Illinois – 1924
Missouri – 1924
Montana – 1924
Wyoming – 1924
Idaho – 1927
Texas – 1927
So. Dakota – 1930

talions, until the slower, animal-drawn vehicles, with their easily noted individuality, are rare. Constructed as covered vehicles to standard form in immense quantities,

and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious question far deeper and broader than their use in so-called 'bootlegging' or 'rum running,' which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfully utilized to facilitate commission of crime of all degrees, from those against morality, chastity, and decency to robbery, rape, burglary, and murder, is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is in its final analysis to be determined as a judicial question in view of all the circumstances under which it is made."

In People v. Roache, 237 Mich. 215, 211 N.W. 742 (1927), this Court held that the defendant should be discharged on

the charge of illegal possession of liquor because the only evidence was obtained by an illegal search of defendant's automobile. Justice Clark dissenting (Justices Sharpe and Steere joining), commented upon the automobile problem as follows (237 Mich. pp. 220, 221, 211 N.W. p. 744):

"The automobile has come to be the convenient instrument of bandits and rum runners. So used, it presents a most difficult problem to officers in their efforts to solve crime. If the rules relative to search and seizure, as applied to the home, be applied with like rigor to the automobile in public places, the automobile bandit and the rum runner are practically immune. That there is a necessary difference between the search of a home and the search of an automobile is recognized. Cardella Case (People v. Cardella, 233 Mich. 505, 207 N.W. 141) supra. Under most liberal rules as to probable cause to search, the officer's problem remains difficult. We are dealing with a condition, a prevalence of crime, menacing to and destructive of the social order. We are not confronted with theory in the abstract. The well-known constitutional provision does not denounce 'all searches and seizures, but only such as are unreasonable.' Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790; People v. Case, 220 Mich. 379, 190 N.W. 289, 27 A.L.R. 686."

December 29, 1933, this Court, in People v. Stein, 265 Mich. 610, 251 N.W. 788, 92 A.L.R. 481, held that a pistol uncovered as the result of an illegal search of a taxicab could not be admitted in evidence, and following this decision, by joint resolution of the house and senate, an amendment to the Michigan Constitution was proposed.

The Attorney General calls to this Court's attention the circumstances that existed before and at the time of the

vote upon this amendment, because the circumstances contributed to the adoption of the amendment, as follows:

"Preceding the vote in November of 1936, the state was plagued with the activities of a vicious organization known as the Black Legion. This organization dealt in senseless murder and in venting its spleen on persons

of different creeds and colors. Its activities were well known in the state through trials or examinations held in Detroit and vicinity. See the record in People v. Petition, 283 Mich. 108 [277 N.W. 193] (October 1937, Docket No. 126) a case charging conspiracy to murder the mayor of Ecorse; the record in People v. Lee, 334 Mich. 217 [54 N.W.2d 305] (April 1952, Docket Nos 82 and 83) involving a murder of a negro citizen to satisfy lust for murder and to provide target practice; and record on application of Lowell Rushing to leave to appeal (Calendar No. 49178½) a case involving the murder of a man because he was a Roman Catholic married to a Protestant woman and the members of the Black Legion believed he had beaten his wife. * * *

"Recognizing the Black Legion for what it was, the Michigan Senate passed a resolution on April 20, 1937, reading as follows:

" 'A resolution congratulating the Detroit Police Department for their work in connection with the breaking up of the Black Legion. * * *' "

In 1936 the people readopted the first 2 sentences of article 2, § 10, of their 1908 Constitution, which read:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and

seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

and then added the following proviso:

"Provided, however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state."

In 1952 the legislature proposed, and the people ratified, another amendment to article 2, § 10, by adding the words "any narcotic drug or drugs."

In 1963, when the people of this State adopted their new Constitution, effective January 1, 1964, they retained the proviso adopted 27 years ago, and readopted 10 years ago, by providing (Art. 1, § 11):

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a police officer outside the curtilage of any dwelling house in this state."

Petitioner contends that Mapp v. Ohio destroyed this

will, wish and desire of the people of this State that has withstood the test of time from the travails of the Black Legion days down to the more peaceful days that have followed up to and including the present time, stating: "The search and seizure exemption provision contained in Article II, Section 10, of the Michigan Constitution is by reason of Mapp v. Ohio repugnant to, in conflict with and in derogation of the Constitution, statutes and laws of the United States, and is not a proper exercise of the police power of the State but is unconstitutional and void."

PEOPLE *v.* BANNAN Mich. 887
Cite as 125 N.W.2d 875

The law applicable and the pertinent facts in regard to the search and seizure in Mapp and the present appeal, Winkle, were entirely different.

In Ohio evidence obtained in a search of defendant's home was admissible in a criminal prosecution, even though obtained by an unlawful search and seizure, if not taken from defendant's person by the use of brutal or offensive force (State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387).

Mr. Justice Clark, in Mapp v. Ohio, labeled the act of the law-enforcing officers as "official lawlessness" and "a flagrant abuse" of basic rights, and set forth the following facts in regard to that search:

"On May 23, 1957, 3 Cleveland police officers arrived at appellant's residence in that city pursuant to information that 'a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home.' Miss Mapp and her daughter by a former marriage lived on the top floor of the 2-family dwelling. * *

"Running roughshod over appellant, a policeman 'grabbed' her, 'twisted [her] hand,' and she 'yelled [and] pleaded with him' because 'it was hurting.' Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

"At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for."

Mr. Justice Douglas in concurring, believing the facts of the search and seizure were so flagrant as to require repetition, stated:

"This criminal proceeding started with a lawless search and seizure. The police entered a home forcefully, and seized documents that were later used to convict the occupant of a crime. She lived alone with her 15-year-old daughter in the second-floor flat of a duplex in Cleveland."

Mr. Justice Douglas further stated that to allow "the 'shabby business' of unlawful entry into a home," would rob the Fourth Amendment of meaningful force, and referred to the unusual facts surrounding the search of Miss Mapp's home, as follows:

"Wolf v. People of State of Colorado, supra, was decided in 1949. The immediate result was a storm of con-

stitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which Wolf imported into the law. * * * It is an appropriate case because the facts it presents show—as would few other cases—the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person."

A search conducted in Michigan comparable to the Mapp search would not have been condoned under our Constitutional law, but would have been condemned. Winkle's home was not searched, but an automobile he was driving which was not registered in his name.

The obscene printed material seized in the Mapp home would not be an item that would be admissible under the Michigan proviso.

In addition to calling attention to the vast difference between the facts in Mapp and Winkle,[4] I quote the following

from the Mapp decision to show the lack of unanimity in deciding State rights even under the Mapp circumstances.

Four members of the court (Mr. Justice Harlan, Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart) subscribed to the statement:

"[F]ive members of this Court have simply 'reached out' to overrule Wolf. * * * [T]he Wolf rule represents sounder Constitutional doctrine than the new rule which now replaces it. * * *

"The occasion which the Court has taken here is in the context of a case where the question was briefed not at

[4] See 358 Mich. 551, 100 N.W.2d 309, and recitation of undisputed facts, supra.

all and argued only extremely tangentially. The unwisdom of overruling Wolf without full-dress argument is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which 3 members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings. I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue."

Mr. Justice Black, after stating that in concurring in the 1949 Wolf v. Colorado decision, he made known in his opinion that the Fourth Amendment, while prohibiting unreasonable search and seizure did not bar the use of evidence so unlawfully obtained, added the following in his concurring opinion in the Mapp Case:

"I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

Mr. Justice Harlan, in Mapp, comments on Justice Black's refusal to join "four members of the majority," as follows:

"In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling Wolf, and not for the basic rationale by which four members of the majority have reached that result. For my Brother Black is unwilling to subscribe to their view that the Weeks exclusionary rule derives from the Fourth Amendment itself * * *, but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth * * *. On that score I need only say that whatever the validity of the 'Fourth-Fifth Amendment' correlation which the Boyd case (Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524,29 L.Ed. 746) found, see 8 Wigmore, Evidence (3d ed. 1940), § 2184, we have only very recently again reiterated the long-established doctrine of this Court that the Fifth Amendment privilege against self-incrimination is not applicable to the States. See

Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156."

Ker v. California, supra, affirmed defendants' (husband and wife) conviction of possession of marijuana, denying defendants' contention that their arrest in their apartment, without warrant, lacked probable cause. Mr. Justice Clark (joined by Mr. Justice Black, Mr. Justice White and Mr. Justice Stewart), at the outset of the opinion, stated: "This being the first case arriving here since our opinion in Mapp which would afford suitable opportunity for further explica-

tion of that holding in the light of intervening experience, we granted certiorari."

Mr. Justice Harlan, concurring in the Ker result, stated:

"The rule is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket, and also because the States, more likely than not, will be placed in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability. * * * (The latter point is indeed forcefully illustrated by the fact that in the first application of its new constitutional rule the majority finds itself equally divided.)"

Mr. Justice Brennan "with whom The Chief Justice, Mr. Justice Douglas, and Mr. Justice Goldberg join," dissents, and comments upon the lack of unanimity in the Ker decision as follows:

"When we declared in Mapp that, because the rights of the Fourth Amendment were of not lesser dignity than those of the other liberties of the Bill of Rights absorbed in the Fourteenth, ' * * * we can no longer permit [them] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend [their] enjoyment,' 367 U.S., at 660, 81 S.Ct. at 1694, 6 L.Ed.2d 1081—I thought by these words we had laid to rest the very problems of constitutional dissonance which I fear the present case so soon revives."

The Committee on Criminal Jurisprudence of the State Bar of Michigan in its brief stating there should be a negative vote to the question: "Does Mapp v. Ohio cause Article II, Sec. 10, of the Michigan Constitution of 1908, as amended to date, to be in violation of the Constitution of the United States?" says:

"The United States Supreme Court has never answered the question whether the Michigan proviso, or anything substantially like it, constitutes a reasonable implementation of the rights reserved to the States under the Federal Tenth Amendment. This question remains open."

The Committee majors the following:

1.—"When the electorate of this State accepted the proviso in 1936, when they amended it in 1952, and when they re-affirmed their support for it in the new Constitution of 1963, they did so in the context of the clear precept of the 1st sentence of Art II, Sec 10:

" 'The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures.'

"They did *not* intend to nullify the 1st sentence. They merely supplemented it. If, nullification was intended, why did they in 1963 re-adopt *both* the 1st sentence together with the proviso? To the contrary, the 2 portions of Art II, Sec 10, work together. The 1st part protects against unreasonableness. The proviso enunciates that the seizure of particular dangerous items outside the home is reasonable.

"The first construction suggested above creates conflict, requiring the ultimate destruction of one provision or the other. The second creates harmony. It saves the whole.

It makes all parts meaningful. The second, which accepts the proviso as a reasonable interpretation of man's right against unlawful search and seizure, is the more desirable, the more logical."

2.—"Essentially, the Ker Court tells us that in State prosecutions in State courts evidence is inadmissible if the result of an unreasonable search and seizure. But Ker recognizes that the concept of a reasonable search and seizure as relates to the States is not governed by any fixed formula. Mapp did not totally obliterate State search and seizure laws; it does not require States to follow federal evidentiary rules. States are not precluded from developing their own workable search and seizure rules to meet practical criminal investigation and law enforcement needs,—so long as such rules do not condone unreasonable searches and seizures. To the extent States can work out reasonable rules which restrict search and seizure to reasonable limitations, they are free to do so according to their practical law enforcement needs. And, the United States Supreme Court recognizes that local law enforcement needs may vary with the particular conditons and circumstances. * * *

"Mapp does not outlaw the Michigan proviso, because the proviso is a reasonable application of the lee-way Mapp and Ker reserve to the States to work out their own rules so long as they do not condone unreasonable search and seizure. And the proviso, read and interpreted as above, does not do that."

3.—"The Tenth Amendment to the United States Constitution should not be over-looked.

" 'The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*' (Emphasis Added).

"The United States Supreme Court in Mapp, 367 U.S. at 653 [81 S.Ct. at 1690-1691, 6 L.Ed.2d 1081], recognized this reservation of State power by pointing out that:

"'Because *there can be no fixed formula*, we are admittedly met with "recurring questions of the reasonableness of searches," * * * and, at any rate, "*reasonableness is in the first* instance for the trial court * * * *to determine.*" ' (Emphasis Added).

"In Kerr v. California [374 U.S. 23, 83 S.Ct. 1623], 10 L.Ed.2d at 736, that Court noted:

"'Mapp, however, established *no assumption by this Court of supervisory authority over state courts,* * * * and, consequently, it implied no total *obliteration of state laws relating to arrests and searches* in favor of federal law. Mapp sounded no death knell for our federalism * * *.' (Emphasis Added).

"And Ker continued [374 U.S. 23, 83 S.Ct. 1623], 10 L.Ed.2d at 738:

"'*The States are not* * * * *precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States,* * * *.' (Emphasis Added)."

4.—"The right to freedom from unreasonable search and seizure must remain inviolate. But within the scope of that which is reasonable, as relates to enforcement of State laws in State Courts, the reserved right of the States and their people to set items of contraband, and physical and moral destruction, aside for special treatment is a Federally guaranteed right under the Tenth Amendment,—and the Tenth Amendment must be given equal consideration with the Fourth."

When this Court decided People v. Gonzales, 356 Mich.

247, 97 N.W.2d 16 (1959), the United States decision of Wolf v. Colorado, supra, prevailed, and that decision did not say we should not follow the exclusionary rule, but merely left it up to our judgment as to whether we should or should not.

This Court unanimously held in Gonzales "article 2, § 10, as last amended in 1952, not offensive to the United States Constitution."

In the writer's opinion, our decision in Gonzales, namely, that we had the right and duty to honor the people's command as expressed in their Constitution, was forcibly expressed by the then Justice Talbot Smith (now United States District Judge, Sixth Circuit) when he wrote (356 Mich. p. 264, 97 N.W.2d p. 24):

"The Constitution does not define liberty, nor do we. In an absolute sense it does not exist. A myriad of commands we follow daily. But not every intrusion upon our person or property is an encroachment so gross that the spirit becomes hostage to the act and we are no longer free. Much will depend upon the circumstances attendant. The car search itself, in the vicinity of a prison break, may be more an act of mercy than an act of oppression. The concept of freedom, then, has no fixed content. Always there is the problem of balance. The freedom of one man necessarily involves the correlative restraint of his brother. Specifically, and with reference to the criminal law, we are sensitive to the constitutional rights of alleged or convicted criminals. See dissent, People v. Moore, 344 Mich. 137, 73 N.W.2d 274, reversed, Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167. But equally sensitive are we to the demands of our people that they be as secure as may be from violence and pillage. All too often, as we know judicially, the auto-

mobile is handmaiden to the assassin. Learned Hand put the problem we will some day reach in these words:

"'The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise.'"

The first ten amendments to the United States Constitution were proposed in 1789 and ratified in 1791, and the Fourteenth Amendment was proposed in 1866 and ratified in 1868.

The first time the United States Supreme Court decided that the Fourth Amendment called for the adoption of an exclusionary rule, solely in the Federal court, was 123 years after the adoption of the Fourth Amendment, and this fact was commented upon in Mapp by Mr. Justice Clark, as follows:

"Finally, the court in that case (Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 59 L.Ed. 652) clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.' * * * Thus, in the year 1914, in the Weeks case, this Court 'for the first time' held that ' in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.'"

The common law did not sanction the exclusionary rule. Justice Cooley, in the 1874 Michigan decision, Weimer v. Bunbury, supra, commented on the common law and the bill of rights, stating:

"The truth is, the bill of rights in the American con-

stitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather

than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

It is evident that man's locomotion in 1791 when the Fourth Amendment was ratified did not and could not contemplate the speed or the problems of law enforcement that were created by the automobile.

Nothing in the amendments point toward a distinction between automobiles and homes in regard to necessity for a search warrant in making a legal search, but that distinction has been definitely made by our United States Supreme Court, and was probably created because of such problems of law enforcement as are referred to in our Michigan decisions mentioned above.

The Michigan proviso does not condone illegal search. It was an expression by the people of this State to the citizenry that if they have in their possession, outside the curtilage of their dwelling, drugs, firearms, or dangerous weapons, or things, said possessor would not have the right to question the legality of the search as a defense to illegal possession.

That the States should not be circumscribed in the exercise of the police power, is clearly recognized by the United States Supreme Court and was expressed in Salsburg v. Maryland, 346 U.S. 545, 550, 74 S.Ct. 280, 282, 98 L.Ed. 281,

as follows: "A state has especially wide discretion in prescribing practice relating to its police power."

The difference between laws and facts applicable to Mapp and Winkle; the lack of unanimity apparent in the decision of Mapp, plus the decision's absence of conclusions which apply to the Michigan proviso, and our unanimous decisions in Gonzales and Winkle to the effect that our proviso did not violate the United States Constitution, causes the writer to recommend that this Court by proper order reaffirm its previous decision reported in 358 Mich. 551, 100 N.W.2d 309, People v. Winkle.

Accordingly, the order of this Court entered April 26, 1962, dismissing petitioner's writs of habeas corpus and ancillary certiorari stand affirmed.

O'HARA, J., concurred with KELLY, J.

DETHMERS, Justice

[5] In Cole v. City of Battle Creek, 298 Mich. 98, 104, 298 N.W. 466, 468, appears the following:

"In Township of Warren v. Raymond, 291 Mich. 426, 289 N.W. 201, 203, we said:

"'This Court has repeatedly held that constitutional questions will not be passed upon where other questions are raised which dispose of the case. Smith v. Curran, 267 Mich. 413, 255 N.W. 276, 94 A.L.R. 766; Stewart v. Algonac Savings Bank, 263 Mich. 272, 248 N.W. 619; Brown v. Hill, 216 Mich. 520, 185 N.W. 751; North Michigan Water Co. v. City of Escanaba, 199 Mich. 286, 165 N.W. 847; People v. Quider, 172 Mich. 280, 137 N.W. 546, and authorities therein cited.'"

In People v. Bissonette, 327 Mich. 349, 42 N.W.2d 113, this Court declined to pass on the constitutionality, under the Fourteenth Amendment of the United States Constitution, of the very search and seizure proviso of the Michigan

MICRO CARD 22
TRADE MARK ®
PC 70 2
MATTHEW BENDER & COMPANY
MB
56-9
m
microcard

Constitution here attacked by petitioner, for the announced reason that it was not essential to decision of the case. Neither is it essential to decision here.

For the reasons stated in the first portion of Mr. Justice KELLY'S opinion, holding that the search and seizure were not unreasonable or unlawful for the reason that they were based upon probable cause on the part of the officers to believe that there was in the automobile, or might be, evidence that a crime had been or was being committed[1], I concur in affirmance of this Court's order of April 26, 1961, denying petition for writs of habeas corpus and certiorari.

PEOPLE v. BANNAN Mich. 893
Cite as 125 N.W.2d 875

BLACK, J., concurred in result.

Before the Entire Bench, except ADAMS, J.

SOURIS, Justice (for affirmance.)

While agreeing with by Brothers KELLY and DETHMERS that the search and seizure here involved were reasonable within federal and state constitutional meaning, I am not sure I understand the basis upon which Justice KELLY reaches that conclusion nor am I in agreement with Justice DETHMERS' statement that the search and seizure were reasonable because "based upon probable

[1] In People v. Gonzales, 356 Mich. 247, 253, 97 N.W.2d 16, 19, the following appears:

"A lawful arrest is not a necessary condition precedent to a lawful search and seizure without warrant. Facts which indicate probable cause to believe a felony is being committed have many times been held to render 'reasonable' within constitutional terms a search and seizure without warrant. People v. Licavoli, 245 Mich. 202, 222 N.W. 102; People v. Miller, 245 Mich. 115, 222 N.W. 151; People v. Orlando, 305 Mich. 686, 9 N.W.2d 893; Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; * * *."

cause on the part of the officers to believe that *there was in the automobile, or might be, evidence that a crime had been or was being committed*" (italics added).

Just last November, in People v. Kuntze, 371 Mich. 419, at 426 and 427, 124 N.W.2d 269, at 273 and 274, this Court unanimously held (Justice O'Hara not participating) that a search could be made by police officers without a warrant when a crime, either a felony or a misdemeanor, was being committed by defendants in their presence or upon probable cause to believe that defendants had committed a felony. Considering what we held in Kuntze, and what we said,[2] Justice DETHMERS' language, "that a crime had been or was being committed", is much too broad for the reason that it would permit a search in circumstances legally insufficient to justify an arrest under our law,—upon probable causes to believe a *misdemeanor had been* committed.

The record before us in Winkle, including petitioner's own statement of facts from which Justice KELLY has quoted at length, amply supports our finding that the search and seizure of Winkle's car were constitutionally justified within the Court's holdings in Kuntze and the authorities therein relied upon. At the time the search commenced, from their interrogation of defendant and his companion the troopers had probable cause to believe (whether they actually did so believe is beside the point in determining the reasonableness of the search and seizure) that the automobile had

---

[2] To same effect see Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879.

"It should not be implied from what has been said that search and seizure without a warrant may be made merely on probable cause to believe a misdemeanor is being committed. In this case Trooper Righter had actual knowledge, not just probable cause to believe, that a misdemeanor was in fact being committed in his presence." 371 Mich. at 427, 124 N.W.2d at 273.

been stolen. They then knew that the automobile was not owned by either occupant; that, although defendant claimed to be a resident of Indiana, he carried a Florida driver's license; and that, because of conflicting stories the occupants of the car told the troopers, either or both occupants had lied about their residences and their destinations. Considering also the fact that the troopers' encounter with defendant and his companion occurred at 2 o'clock in the morning and that their interest was aroused initially by the defendant's haste in making a turn in violation of a traffic control signal, I cannot conceive, any more than can Justice KELLY, what justification there could have been had the troopers failed to make a search such as they did make.

[5] Having concluded that the search and seizure were

reasonable and that the objects seized were, therefore, admissible in evidence during trial, defendant's conviction is not subject to the collateral attack he makes. I agree with Justice DETHMERS that, under such circumstances, we need not, and we should not, decide the issues considered in parts 2 and 3 of Justice KELLY'S opinion.

Kavanagh and Smith, JJ., concurred with Souris, J.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 4th day of March in the year of our Lord one thousand nine hundred and sixty-four.

In re Petition of
49295½
George H. Winkle

PRESENT: The Honorable THOMAS M. KAVANAGH, Chief Justice, JOHN R. DETHMERS, HARRY F. KELLY, EUGENE F. BLACK, THEODORE SOURIS, OTIS M. SMITH, MICHAEL D. O'HARA, PAUL L. ADAMS, Associate Justices.

A motion for rehearing having been heretofore submitted herein it is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of March in the year of our Lord one thousand nine hundred and sixty-four.

DONALD F. WINTERS,
Clerk.

Office-Supreme Court, U.S.
FILED
OCT 30 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 553

PEOPLE OF THE STATE OF MICHIGAN, ex rel GEORGE H. WINKLE,

Petitioner-Appellant,

vs.

WILLIAM H. BANNAN, Warden of the State Prison of Southern Michigan, Jackson, Michigan,

Respondent-Appellee.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS

FRANK J. KELLEY
Attorney General of the
State of Michigan

James R. Ramsey
Assistant Attorney General
Attorneys for Respondent-Appellee

Business Address:
The Capitol
Lansing, Michigan 48902

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1964

INDEX

Statement 1

Argument

The appeal should be dismissed because no substantial federal questions is involved 5

Conclusion 12

Appendix 13

Authorities Cited:

Brinegar v. United States, 338 US 160 9

Carroll v. United States, 267 US 132 9

Christensen v. United States (D.C.), 295 F (2d) 192 9

People v. Blodgett, 46 Cal (2d) 114 ..... 6, 11

People v. Gonzales, 356 Mich 247 8

People v. Simon, 45 Cal (2d) 645 ..... 6, 7

People v. Watkins, 19 Ill (2d) 11 9

Ramirez v. United States, 263 F (2d) 385 10

Winkle, In re, 372 Mich 292 ..... 2, 6

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 553

PEOPLE OF THE STATE OF MICHIGAN, ex rel GEORGE H. WINKLE,

Petitioner-Appellant,

vs.

WILLIAM H. BANNAN, Warden of the State Prison of Southern Michigan, Jackson, Michigan,

Respondent-Appellee.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS

Pursuant to Rule 16, paragraph 1 (b) of the Revised Rules of this court, respondent-appellee, William H. Bannan, moves that the appeal be dismissed.

STATEMENT

[The appellant has referred to the Joint Appendix in his jurisdictional statement. We are making references to the same Joint Appendix. We have extracted and are attaching as an Appendix hereto the pages of

the Joint Appendix to which we are making reference. The original pagination of the Joint Appendix is kept. Pages 6a and 7a are from the excerpts of the testimony in the Justice Court examination. The other pages are from the testimony taken in Circuit Court. The reference in parentheses are to these pages in the Joint Appendix].

This is an appeal from the decision of the Supreme Court of Michigan in the case of *In re Winkle*, 372 Mich 292.

Mr. Winkle was convicted in the Lenawee Circuit Court on two counts: (1) carrying concealed weapons; and (2) possession of burglar tools. On appeal to the Supreme Court the convictions were affirmed (358 Mich 551).

Subsequently thereto, a petition for habeas corpus was filed in the Supreme Court of Michigan and denied. A petition for certiorari was filed with the Supreme Court of the United States and given Miscellaneous Docket No. 93. On November 6, 1961 an order was entered as follows:

> "The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and, as suggested by the Attorney General of Michigan, the case is remanded for consideration in light of Mapp v. Ohio, 367 US 643."

The case was briefed, argued and decided by the Michigan Supreme Court, being reported in 372 Mich 292. The Michigan Supreme Court determined that on the facts presented by the record the search was reasonable. While the members of the court gave different reasons for arriving at this result, all of the participating judges agreed with that conclusion. This appeal followed. The facts supporting

the conclusion of the Michigan Supreme Court were stated by the court as follows:

"The following facts are undisputed by both petitioner and respondent, and are accordingly adopted:

"'On July 21, 1957, at approximately 2 a.m., petitioner George H. Winkle (hereinafter called Winkle), accompanied by Lee Casteel, was traveling west on US-223, south of the city of Adrian, Michigan. As they approached the intersection of US-223 and M-52, the traffic light regulating the intersection turned amber, Winkle came to a stop on the corner of US-223 and M-52. Winkle waited for the traffic to clear on M-52, the north and south roadway, and then before the traffic light turned green, made a left-hand turn onto M-52 and proceeded south for approximately 100 feet and made another left-hand turn into the driveway of the Rock Inn Motel.

"'Winkle had a few minutes prior, caused a telephone call to be made to the Rock Inn Motel to determine the availability of accommodations on the particular night. As the Winkle car proceeded up the drive of the Rock Inn Motel they were approached from behind by a Michigan State police patrol car carrying 2 Michigan state troopers. The officers honked their horn twice as they approached the Winkle car and the Winkle car came to a stop, in the driveway, 20 feet east of the office of the Rock Inn Motel. Mr. Winkle got out of his car and proceeded to walk towards the Michigan State police car. The driver of the State police car, Trooper Robert Golm, walked towards the Winkle car and met Winkle somewhere in the vicinity of the rear bumper of the Winkle car.

"'Trooper Golm requested Winkle's driver's license, and informed Winkle that they were stopping his car for disobeying the red light. Winkle displayed to Trooper Golm a driver's license bearing the name of George Henry Winkle. He also displayed a certificate of registration for the automobile which he was driving, in the name of Henry Williams. Winkle explained the car was his brother-in-law's. Therefore the name on the registration was different than on his driving license. Trooper Golm also requested information from Winkle as to his destination. While this conversation was occurring between Trooper Golm and Winkle, the other trooper, Anthony Pandol, was talking to Lee Casteel, the other occupant of the car. The troopers then switched, Trooper Golm going over to talk to Casteel and Trooper Pandol going over to talk to Winkle.

"'Shortly after this, Trooper Golm returned and talked with Winkle and had by this time been given conflicting statements as to destination, purposes, et cetera.'"

The driver's license which was displayed was one issued by the State of Florida (21a). The conflicting statement as to destination, purposes, et cetera, referred to in the last paragraph of the above quotation, is set forth below with appropriate references to the testimony.

Winkle	Philbrick alias Casteel (7a)
1. "[H]e was going to Detroit and planned on doing some fishing up around Pontiac and Oakland County." (23a) also (6a9)	1. "[He] was on the way down to Toledo to see some girls." (7a).
2. "Asked him for how long he was going, and he said two or three weeks. He said he didn't have to be back any special time." (23a); also (6a).	2. "I asked him if he was working. He said yes, he was a radio technician. And I asked him when he had to be back to work. If he had to be back to work Monday morning. • • • He said yes, he had to go back to work Monday morning" (7a).
3. "He was living in a motel around Indianapolis. (24a); also (7a).	3. "[H]e was living with this George Winkle, his partner there, and they were living in an apartment house on Central Street." (7a).

ARGUMENT

THE APPEAL SHOULD BE DISMISSED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

The Fourteenth Amendment question of the validity of the proviso of the Michigan Constitution, which is italicized in the quotation commencing on page 15 of the appellant's jurisdictional statement, is not involved because the search

of appellant's automobile was reasonable and the evidence found as a result of the search was therefore properly allowed in evidence without reliance upon the provisions of this portion of the Michigan Constitution.

There was nothing unreasonable about the officers questioning the appellant and his companion after they were stopped for running through a red light.

People v. Simon, 45 Cal (2d) 645;

People v. Blodgett, 46 Cal (2d) 114.

During the lawful questioning of the appellant and his companion, the officers discovered certain pertinent facts which they had within their knowledge at the time they made the search. The facts found by the court and relied upon are stated in Mr. Justice Kelly's opinion in *Re Winkle*, 372 Mich 292, at page 302, as follows:

> "The following facts and circumstances were well known to the arresting officers: (1) It was 2 a.m. Sunday; (2) The automobile was legally stopped; (3) The car was not registered in the name of either occupant; (4) There was an open bottle of vodka on the front seat of the automobile; (5) The men were from Indiana and the driver displayed a Florida driver's license; (6) The occupants told the troopers completely and radically conflicting stories as to their places of residence, their destination, the purpose of their trip, and the length of their intended stay.
>
> "The facts and conflicting statements of petitioner and his associate were completely inconsistent and irreconcilable with those of innocent travelers on the highway."

This statement was concurred in by three of the other participating justices, namely, Justices O'Hara, Dethmers and Black. It also had the approval of the remaining three participating Justices. Mr. Justice Souris in his opinion stated (page 327):

> "At the time the search commenced, from their interrogation of defendant and his companion the troopers had probable cause to believe (whether they actually did so believe is beside the point in determining the reasonableness of the search and seizure) that the automobile had been stolen. They then knew that the automobile was not owned by either occupant; that, although defendant claimed to be a resident of Indiana, he carried a Florida driver's license; and that, because of the conflicting stories the occupants of the car told the trooper, either or both occupants had lied about their residences and their destinations. Considering also the fact that the troopers' encounter with defendant and his companion occurred at 2 o'clock in the morning and that their interest was aroused initially by the defendant's haste in making a turn in violation of a traffic control signal, I cannot conceive, any more than can Justice Kelly, what justification there could have been had the troopers failed to make a search such as they did make."

In *People v. Simon*, 45 Cal (2d) 645, it was said (page 648):

> "Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing un-

reasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it. In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. (See *United States v. Rabinowitz*, 339 US 56, 60-64 [70 S Ct 430, 94 L ed 653]). We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest."

This is also the Michigan rule. In *People v. Gonzales*, 356 Mich 247, the court said (page 253):

"This does not, however, answer all our problems. A lawful arrest is not a necessary condition precedent to a lawful search and seizure without warrant. Facts which indicate probable cause to believe a felony is being committed have many times been held to render 'reasonable' within constitutional terms a search and seizure without warrant. *People v. Licavoli*, 245 Mich 202; *People v. Miller*, 245 Mich 115; *People v. Orlando*, 305 Mich 686; *Scher v. United States*, 305 US 251 (59 S Ct 174, 83 L ed 151); CL 1948, § 764.15 (Stat Ann 1954 Rev § 28.874)."

To the same effect see:

Carroll v. United States, 267 US 132;
Brinegar v. United States, 338 US 160.

The finding of the Michigan Supreme Court in *Re Winkle*, 372 Mich 292, that the search was reasonable, is in accordance with the decisions in other jurisdictions which have had occasion to pass upon searches under facts similar to those presented here.

Thus in *Christensen v. United States* (D.C.), 259 F (2d) 192, the court said (page 193):

> "In determining whether there was probable cause for the arrest, we must view the situation as it appeared to 'the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment.' • • • Neither one standing alone[1] would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer."

In *People v. Watkins*, 19 Ill (2d) 11, the court said (page 19):

> "A search that was made here can be justified, however, without relying solely upon the traffic violation.[2]

---

[1]
A tip from an unidentified informant telling where defendant could be found selling drugs; defendant going from place to place in the restaurant fixed by the tipster engaging persons in whispered conversations; shortly thereafter defendant was seen to carry a small brown paper bag through restaurant and set it down while he put on his coat and he was arrested before he picked the bag up again.

[2]
Illinois is one of the states where traffic violation alone will not justify a search.

> The arresting officers were members of the gambling detail. They knew the defendant and he knew them, because they had arrested him on previous occasions. They watched him park his car and saw him go into the building. He saw them at that time. He emerged twenty minutes later, but ran back into the building as soon as he saw that the officers were still there. Police officers often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals. With this in mind, we think that the circumstances made it reasonable for the arresting officers to assume that they were dealing with a situation more serious than a routine parking violation. The search of defendant's person after his arrest did not, therefore, violate his constitutional right against unreasonable search and seizure, and the policy tickets obtained by the search were properly admitted in evidence."

The United States Court of Appeals for the Fifth Circuit approved the opinion of the United States District Court as follows:

> "In addition, I think the officers had reasonable grounds to believe that a customs offense was being committed even though the checking point was, of necessity, somewhat removed from the border. Defendants were nervous and evasive; they were reluctant to have the trunk of the automobile opened at all. While the result of the search cannot justify an arrest, the search here, in my opinion, was not unreasonable. Cf *Flores v. United States*, 5 Cir., 234 F 2d 604; *Haerr v. United States*, 240 F 2d 533." *Ramirez v. United States*, 263 F (2d) 385.

In *People v. Blodgett*, 46 Cal (2d) 114, it was said:

> "Although the cab driver could have been arrested for double parking, the search of his cab cannot be justified on that ground, for it had no relation to the traffic violation and would not have been incidental to an arrest therefor. * * *. It was justified, however, on another ground. There is nothing unreasonable in an officer's questioning persons outdoors at night. * * *, and in view of the hour and the unusual conduct of the occupants of the cab it was not unreasonable for the officers to order them to get out of the cab for questioning. Since Officer Barker saw defendant's furtive action in getting out, he had reasonable grounds to believe that he was hiding contraband and the search of the cab was therefore reasonable."[3]

---

[3] The facts in the Blodgett case are recited by the court as follows:

"At approximately 3 a.m. the following morning Mrs. Grundy and Sanders were together at the Willow Hotel. Sanders left to get a cab, found one at a taxi stand a block away, got in the front seat and asked the driver to drive to the hotel. The cab double parked in front of the hotel and Sanders went in. Shortly thereafter Mrs. Grundy came out of the hotel, got in the cab, and sat on the right side of the rear seat. At about the same time defendant approached the cab and told the driver that he wished to go to 12th and Broadway. The driver told him that if his other fare was going in the same direction, he could go along. Defendant then entered the cab and sat on the left side of the rear seat. In the meantime, Officers Barker and Tarabochia of the Oakland Police Department had been observing the cab as it stood in front of the hotel and decided to investigate it. They approached and ordered the occupants to get out. As Officer Barker opened the left rear door he saw defendant withdraw his left hand from behind the seat at the juncture of the seat and back cushion. After defendant and Mrs. Grundy got out, the officer removed the rear seat and found three marijuana cigarettes where defendant had withdrawn his hand.

CONCLUSION

We urge that the search was justified, being based upon a probable cause to believe that a crime was being committed or had been committed and that, in fact, the officers would have been derelict in their duty to the people of the State of Michigan had the search not been made. The motion to dismiss for lack of a substantial question should be granted. Should the proceeding taken be treated as a petition for certiorari, as is suggested by the appellant, the petition should be denied for the same reason.

FRANK J. KELLEY
Attorney General of the
State of Michigan

James R. Ramsey
Assistant Attorney General
Attorneys for Respondent-Appellee

APPENDIX

(The pages in this Appendix are 6a, 7a, 21a, 23a and 24a. These are the numbers these pages bore in the joint appendix which has been referred to by petitioner in his brief. It is thought that keeping this pagination might help the court.)

him for running the red light there and asked him where he had been coming from and where he was going.

At that time he told me he was coming from Indianapolis, Indiana, and was heading for Adrian. We asked him for the registration of his car and he gave us the registration in the name of George Williams. And he mentioned this as being his brother-in-law and he had borrowed the car from him.

Asked him where he was going, what he was planning on doing in Michigan. He said he was on a two or three weeks vacation and planned on doing some fishing up around Detroit and Pontiac.

Q. You say a two or three weeks vacation?

A. Two or three weeks.

Q. Did he say two or three weeks? Is that what he said to you, "Two or three weeks."

(9e) A. Yes, he said he was going on vacation for two or three weeks fishing trip.

Q. A fishing trip?

A. Yes.

Q. Did he say where he was going in Michigan?

A. He said he planned on going around Detroit and then going up around Pontiac in Oakland County, he said.

Q. All right, go ahead. What then?

A. Well, then, meanwhile my partner Pandol, Tony Pandol, he went up. He was talking to the passenger of the car, and had got out of the car. And then Tony walked on back to the rear of the car and I walked up and talked to the passenger.

I want to go back a little ways. When we first stopped the man, I was first talking to him, asked what his partner's name was. He said his name was Philbrick, was his name.

I went up there and talked to Mr. Philbrick and I asked him where he was coming from. He said he was coming from Indianapolis. And asked him where he was going. He said he was on the way down to Toledo to see some girls.

I asked him if he was working. He said yes, he was a radio technician. And I asked him when he had to be back to work. If he had to be back to work Monday morning. (10e) He said yes, he had to be back to work Monday morning. He said he was self employed.

And then I asked him where he had been living and he said he was living with this George Winkle, his partner there, and they were living in an apartment house on Central Street.

I think I asked him—I asked George Winkle first when I talked to him, I asked him where he had been living. He said he was living in a motel around Indianapolis, and asked him where his friend was living. He said he was living with relatives in the apartment up on Central Street.

Then I walked back to the rear of the car and I had this Norman Philbrick stand out to the right of his car, the car he was traveling in.

Q. Let me straighten this out just a minute, Trooper Golm. You refer to a Norman Philbrick. Who is Norman Philbrick as far as the name we have given these two respondents?

A. The one identified as Casteel.

• • • •

(29e) *Cross Examination*

By Mr. Tucker:

Q. What's your rank, officer?

A. Trooper.

A. George.

Q. From there give them to me. I will have them properly marked and we will look them over some more. Try to (14) find the registration.

A. Here is the registration, name of George Williams, and here is the license.

(Paper marked Exhibit Number 1.)

Q. Showing you People Exhibit 1 for identification, is that the item that you have already identified as the registration that he showed you in the name of George C. Williams? (Handing Exhibit to the witness.)

A. Yes.

Q. Now, do you know which of those he showed you?

A. This license here, Florida license, in the name of George Henry Winkle.

(Paper marked Exhibit Number 2.)

Q. Showing you People's Exhibit 2 for identification, I ask you if that's the driver's license that you just identified? (Handing Exhibit to the witness.)

A. Yes.

Mr. Glaser: I am going to ask that Exhibits 1 and 2 be received at this time.

The Court: Any objection to these two exhibits?

Mr. Tucker: No objection.

The Court: Exhibits 1 and 2 will be received.

Q. Now, these two referring to Scott and Philbrick, those are not concerned with Mr. Winkle?

(15) A. That's correct.

Mr. Glaser: I have to ask a question for my own information before I have these marked, your Honor.

Q. (Continuing): This refers to Mr. Winkle?

A. Yes, he didn't show us that. We didn't see it until after we got down to the jail.

(Papers marked Exhibits 3 and 4, inclusive.)

Q. All right, now he showed you this registration, which is Exhibit 1, in the name of George C. Williams. is that correct?

A. That's correct.

Q. What you testified to, I believe, the Florida operator's license in the name of Mr. C. Winkle. Is that correct?

A. George Henry Winkle.

Q. All right. Now, what happened then? What was the conversation at that point?

A. I asked him where he was heading for and he said he was (17) going to Detroit and planned on doing some fishing up around Pontiac and Oakland County.

Asked him for how long he was going, and he said two or three weeks. He said he didn't have to be back any special time.

Asked him what his occupation was. Said he was a bartender. And I asked him what his friend's name was. He said his name was Norman Philbrick.

Q. Now, was there any conversation concerning why you had stopped him, anything of that kind?

A. Yes, I advised him just after I asked for his operator's license, why I stopped him. I told him I stopped him for disobeying the red light.

Q. Was that before this conversation concerning the fishing expedition?

A. Yes.

Q. And he stated to you then he was here fishing. Is that generally right?

A. That's correct.

Q. All right, then what happened?

A. Then I walked over and talked to his friend, Norman Philbrick, which my partner had been talking to prior to this time, and my partner came back and talked to Mr. Winkle. I asked Mr. Philbrick where he was headed.

Mr. Hammond: Now, just a minute. I want to (18) object to this testimony, any testimony that he had with Mr. Philbrick, unless it was in the presence of Mr. Winkle and heard by him.

The Court: I think the objection is good.

Mr. Glaser: We are not, of course.

Q. (Continuing): Mr. Philbrick not being here—Mr. Casteel—we can't talk about what conversation you may have had with him out of the presence of Mr. Winkle at this time.

All right, after you talked with Mr. Casteel, as you testified, then what happened?

A. Then I came back and talked to Mr. Winkle again.

Q. All right, what was that conversation?

A. I asked him where he was living in Indianapolis, and he told me he was living in a motel, he was living in motels around Indianapolis.

And while I was talking to Mr. Winkle this time my partner walked up and retrieved the keys from the inside of the car and walked back and opened the trunk, while I was conversing with Mr. Winkle.

Q. All right, did you hear your partner ask anyone whether he could take those keys out of the car?

A. No.

Q. Was this car still standing where it had originally stopped, as you testified?

(19) A. Yes.

Q. That was in the center, I believe you said, in the traveled portion of the drive, where the cars drive back and forth?

A. Yes.

Q. He retrieved the keys from the car at this time, you said?

A. Yes.

LIBRARY
COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 18 1964
JOHN A. DAVIS, CLERK

No. 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PEOPLE OF THE STATE OF MICHIGAN,
ex rel GEORGE H. WINKLE,
Petitioner-Appellant,

v.

WILLIAM H. BANNAN, Warden of the State Prison
of Southern Michigan, Jackson, Michigan,
Respondent-Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF MICHIGAN

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS AND MOTION TO STRIKE

WALTER A KURZ
Attorney for Petitioner-Appellant
2408 Guardian Building
Detroit 26, Michigan
WOodward 2-2564

THE INLAND PRESS, DETROIT, MICHIGAN

INDEX

Page

Argument/Reply

The appeal should be granted and not dismissed because substantial and important federal questions are raised and involved 2-12

Conclusion/Relief 12-13

Authorities Cited:

Agnello v. *United States*, 269 U.S. 30 9

Barnes v. *State*, 130 N.W. 2d 264, 268, 269 ..... 8, 10, 11

Christensen v. *United States*, 259 F. (2d) 192, 193 11

Henry v. *United States*, 361 U.S. 98 ..... 5, 8

Johnson v. *United States*, 333 U.S. 10 ..... 5, 8

Ker v. *California*, 374 U.S. 23, 31, 32 ..... 2, 4, 5, 8

Mapp v. *Ohio*, 367 U.S. 643 ..... 2, 4, 8

Michigan Constitution, Article II, Section 10 3

Miller v. *United States*, 357 U.S. 301 ..... 5, 8

People v. *Blodgett*, 46 Cal. (2d) 114 11

People v. *Gonzalas*, 356 Mich. 247 10

People v. *Simon*, 45 Cal. (2d) 645 ..... 8, 11

People v. *Watkins*, 19 Ill (2d 11, 10, 166 N.E. 433, 437, 438 ..... 11, 12

People ex rel Winkle v. *Bannan*, 372 Mich. 292 ..... 2, 3, 6, 10

People v. *Winkle*, 358 Mich. 551 ..... 2, 10

Preston v. *United States*, 376 U. S. 364 ..... 2, 4, 7, 8

Rios v. *United States*, 364 U.S. 253 ..... 6, 8

Stoner v. *California*, 376 U.S. 483 ..... 2, 4

Taglavore v. *United States* (9th Cir. 1961) 291 F. 2d 262, 265 9

United States Constitution Fourth and Fourteenth Amendments 3, 4, 12

United States v. *DiRe*, 332 U.S. 581 ..... 5, 8

United States v. *Lefkowitz*, 285 U.S. 467 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 553

PEOPLE OF THE STATE OF MICHIGAN,
ex rel GEORGE H. WINKLE,
Petitioner-Appellant,

v.

WILLIAM H. BANNAN, Warden of the State Prison of Southern Michigan, Jackson, Michigan,
Respondent-Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS AND MOTION TO STRIKE

On basis of the reasons and grounds, and arguments in support thereof, set-forth in Appellant's Jurisdictional Statement, pages 3-48, which are incorporated herein by reference, Appellant *denies* the contention of appellee that the [Fourth and] Fourteenth Amendment question of the validity of the provisos of the Michigan Constitutions, which are italicized in the quotations appearing on pages 15 and 16 of the said jurisdictional statement, is not in-

volved because, as appellee claims . . . "the search of appellant's automobile was reasonable and the evidence found as a result of the search was therefore properly allowed into evidence without reliance upon the provisions of this portion of the Michigan Constitution." (Which latter quoted proposition and claim appellant has also denied in its entirety in said jurisdictional statement)

Appellant believes, that in and by said jurisdictional statement, supra, he has in good faith seriously challenged, attacked and questioned the wisdom, propriety, correctness, validity, constitutionality, etc., in the Federal Constitutional sense, of the said Michigan Supreme Court opinion/decision, *People ex rel Winkle* v. *Bannan*, 372 Mich. 292, affirming his two state court convictions.

Appellant Winkle, was originally convicted on basis of the said Michigan Constitutional Search and Seizure exemtion Provisos and his convictions were upheld and affirmed by the Michigan Supreme Court in *People* v. *Winkle*, 358 Mich. 551, which held said Michigan Constitutional Proviso valid and constitutional. Before appellant was allowed to have such affirmance and said claimed validity and constitutionality, in the Federal Constitutional sense, reviewed and passed upon by the United States Supreme Court, the Michigan Supreme Court, on mandate from this Court, re-litigated and re-decided appellant's case, as though in trial de novo, and upheld the search and seizure on claimed non-federal grounds—presumably urging that a search and seizure could be found reasonable and legal on claimed non-federal and independent state grounds and law. By virture of *Mapp* v. *Ohio*, 367 U.S. 643, *Ker* v. *California*, 374 U.S. 23, *Preston* v. *United States*, 376 U.S. 364, and *Stoner* v. *California*, 376 U.S. 483, ke know, and it is now axiomatic,

that such a proposition is no longer true and freedom from invasion of privacy is now a federally protected and Federal Constitution Right.

The Fourth Amendment to the Constitution of the United States guarantees as follows:

> *"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."*

The Michigan Constitutional Exemption proviso, Article II, Section 10, under which the search and seizure herein was upheld—adds on to the 4th Amendment's provisions set-forth above in the following far-reaching and sweeping terms, to wit:

> *"... Provided however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any narcotic drug or drugs, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slingshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or things, seized by any peace officer outside the curtilage of any dwelling house in this state."*

By its terms the aforesaid Michigan Constitutional proviso is repugnant to, in conflict with and in derogation of the terms/guarantees of the Fourth Amendment of the Federal Constitution above.

By virtue of the decision in People ex rel *Winkle* v.

Bannan, supra, (372 Mich. 292), which appellant brings here on appeal, the said Michigan Constitutional search and seizure exemption proviso is in full force and effect in Michigan, still to be used and enforced, although in conflict with the Federal Constitution and laws.

Appellant's appeal herein does present a substantial and important Federal question. The question is of vital and national importance because if this Honorable Court does not now take jurisdiction of this appeal and decide the constitutional validity of the said Michigan Constitutional search and seizure exemption provisos here under attack, every other state in the union will have the opportunity, and will be free, to either amend their own state constitutions or to enact statutes containing search and seizure exemption provisions of like terms, meaning or import as those presently in full force and in effect in Michigan—which are in conflict with the 4th Amendment of the Federal Constitution. The meaning, intent, command, etc., of *Mapp* v. *Ohio*, supra, could and would thereby be seriously thwarted, impaired and even nullified for a considerable period of time.

Assuming, without admitting, that the Michigan Constitutional Provisos under attack herein are not involved as appellee claims (appellant seriously disputes this), the question of the validity and reasonableness of the search and seizure herein made is not precluded or immune from appeal to and review thereof by this court. There are no longer any independent non-federal grounds upon which to hold searches and seizures valid, reasonable and constitutional. See *Mapp* v. *Ohio*, *Ker* v. *California*, and *Stoner* v. *United States*, *Preston* v. *United States*, supra.

In addition to the above, this appeal herein may also present serious and substantial federal questions as to the

existence or non-existence of probable cause to make the arrest and/or searches and seizures herein complained of as well as of the validity and reasonableness of same in the Federal Constitutional sense.

In view of the "arresting officers" testimony that the searches and seizures herein were made as a matter of routine and departmental policy and the ruling/opinion/verdict of the trial judge that before the trunk of appellant's car was unlocked by the officers they had no reasonable grounds to believe that a felony had been or was being committed in their presence by appellant (Jurisdictional Statement, Appendix, AA-1 through AA-7 and A-1 through A-3) the time of the arrest, the belief and action taken thereon at the time of the searches and seizures, the officers later testimony relative thereto and the trial court's finding/determination/ruling thereon becomes (and should be) controlling—not the decision of the Michigan Supreme Court some seven years later stretching and inferring incidents/circumstances in order to achieve a strained finding of probable cause. *Ker* v. *California*, supra, held at pages 31 and 32 that:

> "... [r]easonableness in the first instance for the [trial court] ... to determine." etc.

In the above regard, it becomes very important to determine when the arrest occurred.

> "If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make the arrest lawful, or justify a search as its incident." *United States* v. *DiRe*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S 10; *Miller* v. *United States*, 357 U.S. 301; *Henry* v. *United States*, 361 U.S. 98.

> "The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night." *Rios* v. *United States*, 1960, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688.

The Michigan Supreme Court in its recent decision of Winkle's Appeal herein, 372 Mich. 292, held, among other things, that Winkle was under arrest the moment that the officers honked their horn and compelled him to stop for the alleged traffic violation. The officers themselves testified, that they considered Winkle under arrest at that moment. (See Trial Transcript, page 90; Joint Appendix 78a)

The determination then, of whether or not probable cause existed for Winkle's arrest for the felonies of Possession of Burglar Tools and Carrying a Concealed Weapon must be made as of the time of the initial stopping of his car and should not and cannot be made, determined and based upon the results of the subsequent interrogation made of Winkle and the passenger by the arresting officers—which latter proposition appellee urges upon this Court in the positive sense in his Motion to Dismiss.

The very graphic and dramatic presentation of the alleged conflicting testimony given to the officers by Winkle and the passenger (Casteel) *after* they were stopped and "arrested" is an after-the-fact (of arrest) attempt by appellee to establish probable cause and should be disregarded by this Honorable Court. Moreover, the alleged statements of the passenger (Casteel), allegedly made to one of the officers was not allowed into evidence at trial of the cause because not made in the presence or within the hearing of appellant Winkle. (See Trial Transcript, pages

17 and 18; Joint Appendix 23a and 24a) Appellee shows poor taste in setting forth this testimony, allegedly given at a preliminary examination, but excluded at trial, and is attempting thereby to prejudice the cause of appellant herein. Appellant moves to strike said alleged testimony of Philbrick alias Casteel (7a) set-forth in appellee's Motion to Dismiss, at page 5 and Appendix 6a and 7a.

In appellant's case herein, he was allegedly arrested for a minor traffic violation. At that point, it is amply stated on the record, the "arresting" officers had no probable cause or reason to believe that Winkle and the passenger had committed a felony or were committing a felony in their presence. At that point under the *Preston* v. *United States,* supra, there was nothing to search for as an incident to the "arrest" for a traffic violation and no incidental search under the facts and circumstances of the case was allowed. The subsequent opening of Winkle's automobile trunk was unauthorized and without consent and the search for articles therein was unreasonable in the Federal Constitutional sense. There was further violation of the terms of the *Preston* v. *U.S.,* supra, decision, in that upon opening the trunk, the officer merely saw a drill and one or two crowbars. The officers then and there seized nothing. (See Trial Transcript, pages 20, 75; Joint Appendix 26a, 67a). After appellant and passenger were handcuffed and in custody, the car was subsequently towed to the Blissfield Michigan State Police Post, many miles away, where the car and suitcases were more thoroughly searched and stripped and the bulk of the items, including the gun, listed in the opinion, 372 Mich. 292, and allowed into evidence, were searched for and seized without a search warrant. This latter search and seizure was too remote as to time and place of the original arrest and the seizure of articles thereby was clearly un-

reasonable and unconstitutional under *Preston*, supra; and should now be suppressed. (See Trial Transcript, pages 21, 80; Joint Appendix 26a, 30a, 56a)

Appellant does not concede that the questioning of appellant and passenger, under the facts and circumstances of the case, was either lawful (authorized by law) or based upon probable cause (See Jurisdictional Statement, Appendix AA-1 through AA-7 and A-1 through A-3) but was made as matter of routine and departmental policy. The case of *People* v. *Simon*, 45 Cal. (2d) 645, cited by appellee, in support of such routine questioning is certainly not the law followed by the several states, differs vastly on basis of facts of the case and would certainly be a dangerous law if adopted by this Honorable Court. If adopted it would sweep and wipe away all that the *Mapp*, *Ker* and *Preston* cases, supra, have bestowed upon us and safeguarded. *People* v. *Simon*, supra, is certainly and also not in accord with *Rios* v. *United States*, supra, nor with *United States* v. *DiRe*, *Johnson* v. *United States*, *Miller* v. *United States* and *Henry* v. *United States*, supra.

Other states have frowned upon and denounced the propositions laid-down in *People* v. *Simon*, supra. The very recent Wisconsin case of *Barnes* v. *State*, (Oct. 1964) 130 N.W. 2d 264, involving Searches and Seizures of automobiles, is a case in which defendant was stopped and arrested for a traffic violation and one of the officers then informed defendant that the "violation" justified a search of his person and car. Defendant state, "Go ahead. I am clean." The search of the car revealed no incriminating evidence but defendant was "patted down" for weapons and then one of the officers searched his person by aid of a flashlight. The beam of light was directed into defendant's right hand

overcoat pocket which disclosed a small quantity of green weed particles, later identified as marijuana, and a package of gummed cigarette papers. As a result of finding the marijuana defendant was arrested for possession of narcotics and taken to the police station and booked. He was also issued a traffic summons for the brakelight violation. The trial court denied the motion to suppress the marijuana without opinion. Defendant waived jury and was tried by the court. During trial defendant objected to the admission of the evidence revealed by the search of his person on the same ground as urged on the motion to suppress, but this objection was overruled. Defendant was found guilty and appealed. The Wisconsin Supreme Court held at page 269 in reversing the conviction:

> "However, all searches by police officers are subject to the requirement of reasonableness. This is implicit in the wording of both sec. 11, art. I, Wis. Const. and the Fourth Amendment . . .
>
> "We reject the State's contention that any search of the person of one lawfully arrested is a valid search. Such search to be reasonable must be limited to weapons or the fruits or instrumentalities of the crime for which the defendant was arrested. *Agnello* v. *United States, supra,* 269 U.S. at page 30, 46 S. Ct. 4. Here there could be no fruits of the misdemeanor of driving with a non-operating brakelight . . .
>
> "While defendant conceded the lawfulness of the arrest, we deem it advisable to add the observation that the type of search here conducted raises a strong suspicion that the original arrest for the minor traffic offense committed was but a pretext to search defendant for narcotics. Cf. *Taglavore* v. *United States* (9th Cir. 1961), 291 F. 2d 262, 265. As the United States Supreme Court declared in *United States* v. *Lefkowitz* (1932), 285 U.S. 452, 467, 52 S. Ct. 420,

424, 76 L. Ed. 877. 'An arrest may not be used as a pretext to search for evidence.' "

In *Barnes* v. *State*, at page 268, the Wisconsin Supreme Court further discusses the question of such contemporaneous searches and denounces and attacks, as being unsound law, the case of *People* v. *Gonzalas*, 356 Mich. 247, cited by appellee in his motion to dismiss, page 8, and rendered by the Michigan Supreme Court to sustain the validity/constitutionality of Michigan's Constitutional Search and Seizure Exemptions Provisos here under attack and used by said court to sustain appellant's convictions in both of his State Court Appeals herein (372 Mich. 292 and 358 Mich. 551) and which case (Gonzalas) is invariably and forever relied upon by the Michigan Supreme Court to sustain validity and reasonableness, in the federal constitutional sense, of such arrests, searches and seizures as in appellant's case herein and as herein complained of.

As noted, the Wisconsin Supreme Court in *Barnes* v. *State*, supra, stated at page 268 that:

> "The view that not every case of a lawful arrest for a traffic violation justifies a search of the person of the defendant for weapons finds support in these articles and comments in law reviews: Simeone, Search and Seizure Incident to Traffic Violations, 6 St. Louis University Law Journal (1961) 506; Note, Search and Seizure—Search Incident to Arrest for Traffic Violation, 1959 Wisconsin Law Review, 347; Note, Search and Seizure Incident to Traffic Violations, 14 Hastings Law Journal (1963) 459. A contrary view is expressed in Agata, Searches and Seizures Incident to Traffic Violations —A Reply to Professor Simeone, 7 St. Louis University Law Journal (1962) 1. The Gonzalas Case is

criticized as unsound in, Limitation on Expanding Scope of Legality of Searches and Seizures in Michigan, 9 Buffalo Law Review (1960) 382."

The *Barnes* v. *State* case, quoted at length supra, is certainly more sound and rational in the Federal Constitutional sense in pertaining to the reasonableness of searches and seizures of automobiles made contemporaneously with traffic violations than is the case of *People* v. *Simon*, supra, cited by appellee in his motion to dismiss. *Barnes* v. *State*, supra, is also in point on the facts whereas the Simon case is not. *Barnes* v. *State*, most certainly should be used by this Court in determining appellant's case herein and the substantial federal questions raised herein.

The remaining cases cited by appellee in his Motion to Dismiss, at pages 9-11, namely *Christensen* v. *United States*, 259 F (2d) 192, 193, *People* v. *Watkins*, 19 Ill. (2d) 11, 10, and *People* v. *Blodgett*, 46 Cal. (2d) 114, are certainly not in point on the facts with Winkle's case herein. Most of the cases cited by appellee, whether Federal or State, follow the same reasoning, logic and legal premises set-forth in *People* v. *Watkins*, (166 N.E. 433), supra, cited by appellee, and have required in addition to the traffic violation—something and essentially more by way of Probable Cause before a search and seizure could be found to be legal/reasonable; invariably requiring (1) a showing that consent was freely/voluntarily given and made to the search and seizure, (2) reliable/trustworty information by a known informant that motorist was involved in criminal activity prior to stopping for the alleged violation, or prior knowledge by the police to that effect, (3) sufficient "tailing" or observance of suspected motorist to supply/give more than mere suspicion he had been involved in criminal activities before being

stopped, (4) stopping motorist and arresting him for a misdemeanor or felony other than the traffic violation, etc.

The main case cited by appellee in his Motion to Dismiss at page 9, being *People* v. *Watkins*, supra, recognizes that a minor traffic offense that merely results in issuance of a summons—does not authorize contemporaneous search and seizure, stating at p. 437; (See also p. 438)

> "Such an offense does not, in itself, raise the kind of inferences which justify searches in other cases. Some traffic violations would justify a search. The total absence of license plates . . . as could obscured license plates upon a car being driven in the early morning hours . . ."

Aside from the substantial federal constitutional questions raised by appellant concerning the challenged validity of the Michigan Constitutional Search and Seizure provisos, the search of and seizure of articles from appellant's automobile made under the facts and circumstances herein was clearly unreasonable, and made without probable cause therefor, in the federal constitutional sense, and appellant was denied due process of law under the 4th and 14th Amendments of the Federal Constitution.

CONCLUSION

Appellant urges that his Jurisdictional Statement presents substantial important federal constitutional questions with adequate and substantial reasons, grounds and authorities set-forth therein to allow and require this Honorable Court to take jurisdiction of appellant's cause herein for purposes of review and granting of relief in manner and kind therein requested.

We respectfully urge that appellee's Motion to Dismiss should be denied in its entirety, with costs and attorney fees to appellant; That further, appellant's Motion to Strike, as embodied herein, should also be granted.

Respectfully submitted,

WALTER A. KURZ
Attorney for Petitioner/Appellant
2408 Guardian Bldg.
Detroit 26, Michigan
WOodward 2-2564

MICRO CARD 22
TRADE MARK ®
MATTHEW BENDER & COMPANY
MB
PC 71
69-55
m
microcard